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No. 09- _____

In The

Supreme Court of the United States

THE STATE OF MISSISSIPPI,

Petitioner,

v.

THE CITY OF MEMPHIS, TENNESSEE,
MEMPHIS LIGHT, GAS & WATER DIVISION,
AND THE STATE OF TENNESSEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether ground water residing within the boundaries of the State of Mississippi at the time it entered the Union, which did not under natural circumstances flow into the State of Tennessee, constitutes a natural resource over which the State of Mississippi holds the rights of a sovereign, making the doctrine of equitable apportionment inapplicable.

Whether an action filed by the State of Mississippi solely against the City of Memphis, Tennessee and its public utility for compensation for the wrongful extraction of Mississippi ground water through the use of artificial, mechanical means, constitutes a suit by one state against another state triggering the exclusive jurisdiction of this Court under U.S. Const. Art. III, Section 2 and 28 U.S.C. Section 1251(a).

Whether the Fifth Circuit decision affirming the District Court's order requiring the joinder of the State of Tennessee as a necessary party in the suit against the City of Memphis, Tennessee and its utility division conflicts with the decisions of the Supreme Court and the Eleventh and Eighth Circuits governing application of 28 U.S.C. Section 1251(a).

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: The State of Mississippi

Defendants-Appellees and Respondents: The City of Memphis, Tennessee and Memphis Light, Gas & Water Division

TABLE OF CONTENTS

Questions Presented for Review i

Rule 14.1(b) Statement ii

Table of Contents iii

Table of Authorities vii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved . 2

Statement of the Case 2

I. Background Facts and Issues 2

II. Decision of the District Court 7

III. Decision of the Fifth Circuit 8

Reasons for Granting the Petition 9

I. The Fifth Circuit's Judgment Conflicts with the Decisions of this Court Regarding the State's Sovereign Authority over Natural Resources Within its Borders 9

A. The Mississippi Ground Water is Not a Shared Natural Resource Under *Martin v. Waddell's Lessee* (1842) and Its Progeny Covering One Hundred Sixty Years 9

B. Equitable Apportionment Is Neither a Required Nor an Appropriate Remedy in Mississippi's Civil Action 13

II. The Opinion of the Fifth Circuit Conflicts with Mississippi's Decisional and Statutory Law Applicable to the Preservation and Management of its Natural Resources 15

A. *Cinque Bambini* and Mississippi's "Omnibus Water Rights Act" 16

B. The Fifth Circuit's Decision Effectively Abrogates the Public Trust Doctrine and Conflicts with the Laws of All States Regarding State Ownership and Control of Water Resources 19

III. The Fifth Circuit's Judgment Conflicts with the Decisions of the Court and Their Application by the Eleventh and Eighth Circuits Limiting the Court's Exercise of its Original and Exclusive Jurisdiction under U.S. Const. Art. III, Section 2 and 28 U.S.C. §1251(a) 20

IV. This Case Presents Questions of National Importance Regarding the Sovereign Rights of Mississippi and All Other States to Ownership and Control of State Water Resources 28

Conclusion 31

Appendix

Appendix A
Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, dated June 5, 2009 ..... 1a

Appendix B
Bench Opinion Dismissing Action Without Prejudice, dated February 6, 2008 ..... 19a

Appendix C
Order Denying Motion for Judgment on the Pleadings and Denying Motions for Partial Summary Judgment, dated September 25, 2007 ..... 30a

Appendix D
Order Denying Motion to Alter or Amend, dated September 13, 2005 ..... 34a

Appendix E
Order Denying Motion to Dismiss, dated August 9, 2005 ..... 37a

Appendix F
U.S. Const. Art. III, § 2 ..... 39a
28 U.S.C. § 1251 ..... 40a
Miss. Code Ann. § 51-3-1 ..... 41a

Appendix G
Color Figures with Explanatory Notes 43a

Appendix H
Examples of Decisional Law, Legislative Enactments and Constitutional Provisions of Various States Declaring State-Ownership and Control of Water Resources as a Function of Statehood and Inherent Sovereignty and Examples of Federal and State Studies Confirming the Diversion of Mississippi's Ground Water by Memphis-MLGW 54

TABLE OF AUTHORITIES

Cases

Alabama v. United States Army Corps of Eng'rs,
382 F.Supp.2d 1301 (N.D. Ala. 2005) . . . . *passim*

Alabama v. United States Army Corps of Eng'rs,
424 F.3d 1117 (11th Cir. 2005) . . . . . *passim*

Alaska v. Arctic Maid,
366 U.S. 199 (1961) 29

Andrus v. Utah,
446 U.S. 500 (1980) 31

Arizona v. New Mexico,
425 U.S. 794 (1976) 27, 28

California v. Nevada,
447 U.S. 125 (1980) 26, 27

Central Pines Land Co. v. United States,
274 F.3d 881 (5th Cir. 2001) 21

Cinque Bambini P'ship v. State of Mississippi,
491 So.2d 508 (1986) . . . . . *passim*

Comm'r of Internal Revenue v. Standard Life & Accident Ins. Co.,
433 U.S. 148 (1977) 31

Connecticut v. Cahill,
217 F.3d 93 (2nd Cir. 2000) 25

Georgia v. Tennessee Copper Co.,
206 U.S. 230 (1907) 21

Georgia v. United States Army Corps of Eng'rs,
302 F.3d 1242 (11th Cir. 2002) ..... *passim*

Hinderlider v. LaPlata Co.,
304 U.S. 92 (1938) 12, 21

Howard v. Ingersoll,
54 U.S. 381 (1852) 10, 18

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 10

Idaho, ex rel. Evans v. Oregon,
462 U.S. 1017 (1983) 14

Illinois Cent. R.R. Co. v. Illinois,
146 U.S. 387 (1892) 10, 11, 21, 28

Illinois v. Milwaukee,
406 U.S. 91 (1972) ..... *passim*

Kansas v. Colorado,
206 U.S. 46 (1907) 12, 13

Louisiana v. Texas,
176 U.S. 1 (1900) 27

Martin v. Waddell's Lessee,
41 U.S. 367 (1842) 9, 10, 11, 28

Maryland v. Louisiana,
451 U.S. 725 (1981) 23, 26

Massachusetts v. Missouri,
308 U.S. 1 (1939) 23, 27

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957) 29

Mississippi v. Louisiana,
506 U.S. 73 (1992) 24, 26, 27, 28

Montana v. United States,
450 U.S. 544 (1981) 10

New York v. Ferber,
458 U.S. 747 (1982) 29

New York v. Louisiana,
274 U.S. 488 (1927) 23

New York v. O'Neill,
359 U.S. 1 (1958) 29

New York v. United States,
326 U.S. 572 (1946) 30

North Dakota v. Minnesota,
263 U.S. 365 (1923) 26

Ohio v. Wyandotte Chems. Corp.,
401 U.S. 493 (1971) 27

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,
429 U.S. 363 (1977) 10, 11, 28, 30

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 24

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988) 10, 11, 28, 29

Pollard v. Hagan,
44 U.S. 212 (1845) 10, 11, 28

South Dakota v. Ubbelohde,
330 F.3d 1014 (8th Cir. 2003), *cert. den.*,
541 U.S. 987 (2004) ..... *passim*

State ex rel. Rice v. Stewart,
184 Miss. 202, 184 So. 44 (1938) 16, 19

State Game & Fish Comm'n v. Louis Fritz Co.,
187 Miss. 539, 193 So. 9 (1940 ..... 16, 19

Territory of Alaska v. American Can Co.,
358 U.S. 224 (1959) 31

Texas v. New Mexico,
462 U.S. 554 (1983) 27, 28

United States v. Mitchell,
463 U.S. 206 (1982) 30

United States v. Nevada,
412 U.S. 534 (1973) 24, 27

United States v. Zazove,
334 U.S. 602 (1948) 31

Wisconsin v. Illinois & Sanitary Dist. of Chicago,
278 U.S. 367 (1929) 15

Wyoming v. Oklahoma,
502 U.S. 437 (1991) 23, 26

Constitution

U.S. Const. Art. III, § 2 . . . . . 2, 20

Statutes

28 U.S.C. §1251 . . . . . 2, 26
28 U.S.C. §1251(a) . . . . . *passim*
28 U.S.C. §1251(b)(3) 8
28 U.S.C. §1254(1) 1
28 U.S.C. §1331 1
28 U.S.C. §2101(c) 1
MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008) 2, 16, 17, 29
MISS. CODE ANN. §51-4-1 (1976) 16

Rules

Sup. Ct. R. 13.1 1
Sup. Ct. R. 13.3 1
Sup. Ct. R. 14.1(f) 2
Sup. Ct. R. 14.1(g)(ii) 1

Other Authorities

American Society of Civil Engineers, "Regulated Riparian Model Water Code," Section 1-R-1-01 (2004) 17

Richard J. McLaughlin, "Mississippi" in 6 *Water and Water Rights*, 712 (Robert E. Beck, Ed., 1991, repl. vol. 2005) 16

PETITION FOR A WRIT OF CERTIORARI

Mississippi respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the U.S. Court of Appeals for the Fifth Circuit, dated June 5, 2009, and its judgment, dated June 29, 2009, are reproduced at App. A, 1a - 18a.

The Bench Opinion Dismissing Action Without Prejudice of the U.S. District Court for the Northern District of Mississippi, Delta Division, dated February 4, 2008, is officially reported at 533 F. Supp.2d 646 (N.D. Miss. 2008) and is reproduced at App. B, 19a - 29a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 5, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the Court of first instance had federal question jurisdiction under 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are Article III, Section 2 of the United States Constitution; 28 U.S.C. Section1251; and Mississippi Code Annotated Section 51-3-1 (2008). Pursuant to Supreme Court Rules 14.1(f) & (i)(v), the relevant constitutional and statutory provisions are reproduced verbatim at App. F, 39a - 42a.

STATEMENT OF THE CASE

PREAMBLE

The State of Mississippi ("Mississippi") requests this Court's review and reversal of the Fifth Circuit's opinion and judgment, App. A. In the event this Court does not grant Mississippi's petition and reverse the Fifth Circuit on the questions presented for review, then Mississippi requests this Court to review and grant Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously herewith.

I. BACKGROUND FACTS AND ISSUES

On December 10, 1817, Mississippi was admitted to the Union on an equal footing with the original thirteen colonies, retaining all attributes of sovereignty not ceded to the federal government in the United States Constitution. On admission to the Union the federal government transferred title to all land within the state borders and to the natural resources above and below the surface of that land, except to the extent expressly reserved by the United States. It is

well established that one of the attributes of sovereignty retained by the states is the power to preserve, protect and regulate the use of all natural resources found within the states' established borders.

This action arises from the wrongful taking and conversion of a natural resource over which Mississippi holds sovereign authority under the Constitution and Laws of the United States: ground water contained within a deep confined aquifer which, under natural conditions, has resided within the territorial boundaries of Mississippi since long before the drawing of state lines. This ground water is not a naturally shared resource, but one which has been confined within Mississippi's boundaries by the geology of the Sparta or Memphis Sand Aquifer ("the aquifer") in which this finite supply of prehistoric water naturally resides. Under north Mississippi, the aquifer is a deep confined geological formation of limited permeability consisting of dense sand, rock, silt and clay sandwiched between two separate clay formations. The ground water stored in this aquifer accumulated over millennia as it slowly filtered imperceptibly through soil, sediment and rocks to deposit a finite supply of pure water naturally entrapped and residing for thousands of years between the two confining clay strata above and below the deep aquifer sand formation.

Unlike the surface water of watersheds, streams, rivers and lakes which is constantly replenished and flows freely from place to place, the ground water in the aquifer beneath Mississippi is a pure finite resource, and only arduously moves under natural conditions. Once collected in the deep confined aquifer the accumulated ground water does not move freely or

randomly; rather, its movement is restricted by the porosity and surface friction of the constituents of the geology and the direction is determined by the geologic formation of the confining clays. In north Mississippi this geology has always restricted both the introduction of new water into the aquifer, and the natural movement of the finite supply of ground water contained in the aquifer. Ground water extracted from the aquifer in Mississippi takes thousands of years to replenish; and, under natural conditions, the ground water stored in the aquifer only moves about an inch per day, or 30.4 feet per year across north Mississippi in a predominately east to west direction. App., 44a-45a. These forces created an essentially static reserve of pure water which has resided within the present boundaries of Mississippi for thousands of years. The same geological factors created a similar finite, confined reserve of ground water beneath the western part of the State of Tennessee ("Tennessee").

With the growth of the City of Memphis ("Memphis"), it has authorized its wholly owned division, Memphis Light, Gas & Water ("MLGW"), to construct and operate an increasingly larger and larger water well pumping operation withdrawing water from the aquifer to the point that MLGW now boasts that it operates one of the largest water well pumping operations in the world, consisting of over one hundred seventy-five wells pumping from ten separate well fields drawing from the aquifer. App. 52a-53a. In its constant expansion of its water well pumping operation MLGW has located three of its ten fields very near the Mississippi state border. From these ten fields, MLGW pumps more than two hundred million gallons of ground water daily. This aggressive extraction of ground water by Memphis and

MLGW from the aquifer has largely drained the aquifer under Memphis and created a massive cone of depression within the aquifer extending across the Tennessee state line into Mississippi. By this mechanism, Memphis has siphoned hundreds of billions of gallons of irreplaceable pure water from within Mississippi which would never have crossed into Tennessee's borders in the Memphis area under natural conditions -- and it continues to do so. App., 46a - 51a. The Mississippi ground water being taken by Memphis and MLGW is being derived from an area of Mississippi which is rapidly growing and for which this resource is essential to sustain economic health and future residential and commercial development. This taking by Memphis and MLGW is intentional and they have taken no steps to cease or curtail their activities by which they continue to wrongfully seize over twenty-four million gallons of Mississippi ground water daily.[1]

Mississippi's action is not against Tennessee and the action does not involve a shared natural resource. Neither Mississippi nor Tennessee dispute the other states' sovereign right to control, protect and preserve the ground water naturally residing within their respective lawful boundaries and no such rights are at

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[1] For a more comprehensive discussion of the aquifer and the impact of MLGW's pumpage on Mississippi's ground water resources, *see* Affidavit of David A. Wiley (Professional Geologist) with excerpts from his expert report entitled "Report on Diversion of Ground Water from Northern Mississippi Due to Memphis-Area Wellfields" dated May 2007 annexed as Exhibit 2 to "Appendix G" at 56a-117a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition.

issue in this action.[2] Mississippi's action is against Memphis and MLGW which effectively take the position that Memphis is free to seize and siphon away all the ground water it can extract from within Mississippi by mechanical means as long as its equipment does not physically cross the state line. Under these facts Mississippi has instituted an action against Memphis and MLGW for damages arising from the intentional and wrongful taking of a Mississippi natural resource to which Memphis has no claim of right, and to enjoin future diversions and the conversion of Mississippi's ground water.

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[2] Tennessee's *amicus curiae* brief in the Fifth Circuit appellate proceedings, essentially agreeing with Mississippi's positions regarding the states' ownership and control of all water resources within their separate borders, stated:

> Tennessee certainly has an interest as sovereign in the ground water *within its borders*. Like other natural resources, *the ground water in Tennessee* is held by the state in "public trust" for the use of the people of the state[.] Tenn. Code Ann. §69-3-102(a) (2004). As sovereign, Tennessee may exercise its police power to regulate ground water so as to protect and conserve the public resource. (emphasis, in italics, added).

See "Appendix I" at 235a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition. While Mississippi acknowledges Tennessee's sovereign powers over its ground water, this dispute involves only ground water siphoned and diverted by Memphis' utility's pumping from within Mississippi's borders. No water resources under Tennessee's control are involved.

II. DECISION OF THE DISTRICT COURT

On February 1, 2005, Mississippi sued Memphis and MLGW for monetary damages and injunctive relief for trespass and conversion of state-owned water resources. On three separate occasions, Defendants moved to dismiss the District Court action for lack of subject matter jurisdiction, arguing, *inter alia*, that Tennessee should be joined as an indispensable party-defendant and that such joinder would invoke the original and exclusive jurisdiction of the Supreme Court under 28 U.S.C. §1251(a). Each time, the District Court, relying in part on *Illinois v. Milwaukee*, 406 U.S. 91 (1972), denied Defendants' motions. App., 30a - 38a.

Trial was set for February 4, 2008. On the first day of trial, the District Court *sua sponte* revisited the issue of its subject matter jurisdiction. *See* App.,19a - 29a;, *Hood, ex rel. the State of Mississippi v. The City of Memphis, Tennessee*, 533 F. Supp.2d 646, 646-47 (N.D. Miss. 2008). The trial court held that, because the aquifer underlies parts of Mississippi and Tennessee, Mississippi's action "*must necessarily*" be an action "between two or more States" for purposes of 28 U.S.C. §1251(a). *Id.* at 650. The District Court found that it lacked subject matter jurisdiction and dismissed Mississippi's action without prejudice. *Id.* The District Court also determined that this Court must equitably apportion the aquifer as between Mississippi and Tennessee before the requested monetary damages may be awarded. *Id.* at 649.

III. DECISION OF THE FIFTH CIRCUIT

Mississippi appealed the District Court's dismissal without prejudice to the U.S. Court of Appeals for the Fifth Circuit. On June 5, 2009, the Fifth Circuit, affirming the ruling of the District Court, equated the ground water suspended within a deep confined geologic formation with such clearly shared interstate resources such as rivers, lakes or streams, stating that "[t]he aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests." App., 11a. The Court of Appeals found no error in the District Court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief between Mississippi and Memphis. *Id.*

The Fifth Circuit acknowledged that Mississippi had correctly argued that a suit involving interstate water does not automatically invoke the jurisdiction of the Supreme Court and strip the District Court of jurisdiction. App., 12a. In fact, the Fifth Circuit noted that cases of concurrent jurisdiction (original, but not exclusive jurisdiction) under 28 U.S.C. §1251(b)(3) should be brought in the District Court in the first instance. The court below distinguished the authorities relied on by Mississippi as involving non-state parties, and not other states, despite the fact that Mississippi's action is also, and only, against non-state parties, Memphis and MLGW, not Tennessee. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING THE STATE'S SOVEREIGN AUTHORITY OVER NATURAL RESOURCES WITHIN ITS BORDERS

The Fifth Circuit's decision perpetuates the District Court's confusion between the Court's cases addressing the sovereign rights of a single state over natural resources residing *in situ* within its boundaries and those cases addressing the competing rights of multiple states asserting transitory claims to water naturally flowing through their territories. The equitable apportionment cases address only the latter classification, not the former; and the equitable apportionment remedy does not apply to Mississippi's case against Memphis and MLGW. This is true for at least three reasons: (a) the ground water residing within the aquifer in Mississippi is not a natural resource shared with another state; (b) there is no dispute between competing sovereigns holding legitimate claims to this ground water under the Constitution and Laws of the United States; and (c) equitable apportionment does not afford Mississippi a remedy for Memphis and MLGW's past wrongful conversion of Mississippi's natural resource.

A. The Mississippi Ground Water is Not a Shared Natural Resource Under *Martin v. Waddell's Lessee* (1842) and Its Progeny Covering One Hundred Sixty Years.

By affirming the District Court's decision, the Fifth Circuit implicitly adopted Memphis' argument that a

naturally limited and confined resource -- pure ground water accumulated in a deep confined aquifer residing within a state's boundaries -- cannot be owned, controlled, protected, preserved or regulated by that state. This argument finds no support in the Constitution and Laws of the United States under which this Court has repeatedly recognized the sovereignty of each state over the ownership, preservation, use and control of its natural resources for the benefit of its citizens. Under the equal footing doctrine, each state, upon entry into the Union, became vested with ownership, control and dominion over the natural resources within its territorial boundaries.[3] In *Phillips Petroleum Co. v. Mississippi*, this Court affirmed a decision of the Mississippi Supreme Court declaring the State's ownership and plenary authority over its subterranean resources. 484 U.S. at 476, 479 (affirming *Cinque Bambini Partnership v. State of Mississippi*, 491 So.2d 508, 511-14, 516-17 & 519-20 (1986) (effective upon statehood in 1817, federal law provided that the United States granted to Mississippi in trust all lands, to which the United States then held title, including their mineral, land and other subsurface resources)). Ever since the federal sovereign ceded title to Mississippi, state law

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[3] *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (reaffirming longstanding Supreme Court precedents holding that the states, upon entry into the Union, received ownership of their lands and waters); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-78 (1977); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Howard v. Ingersoll*, 54 U.S. 381 (1852); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). *See also Montana v. United States*, 450 U.S. 544, 551-52 (1981); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286-87 (1997).

has controlled ownership and allocation of the use of Mississippi's natural resources. *Oregon*, 429 U.S. at 378-82; *Cinque Bambini*, 491 So.2d at 513, 516-19. It is, thus, the State's prerogative to control and preserve state-owned resources. *Id.* at 513, 517.

The ground water at issue has been owned by Mississippi for almost two hundred years, since 1817. For over 160 years, an unbroken line of Supreme Court decisions has consistently traced state ownership of natural resources within the states' boundaries above and below the surface to the American Revolution. Each state's right and responsibility to control the natural resources within its boundaries arises from the American colonies' inheritance of England's common law under which the sovereign or King owned all of the waters, forests, game, minerals and profits upon or under the land. *See Phillips Petroleum*, 484 U.S. at 479; *Oregon*, 429 U.S. at 378; *Illinois Centr.*, 146 U.S. at 452; *Pollard*, 44 U.S. at 222-23; *Waddell's Lessee*, 41 U.S. at 410. When the original thirteen colonies joined in rejecting English royal claims by the Declaration of Independence, each colony asserted the same governmental ownership and control of the waters and other natural resources within their boundaries which was previously exercised by the sovereign. As new states entered the Union, each entered on "equal footing" with those of the original thirteen colonies; that is, each new state was presumed to be endowed with the same sovereign rights and privileges, including sovereignty over all natural resources within the particular territory, as retained by the original thirteen. *Pollard*, 44 U.S. at 222-23.

Within the context of natural resources, this Court has consistently recognized that every state, including

Mississippi, owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood. The water resources of each state properly belong to each such state by their inherent sovereignty. *Kansas v. Colorado*, 206 U.S. 46, 93-94 (1907).

Hinderlider v. LaPlata Co. (1938) and other equitable apportionment cases relied on by the Fifth Circuit all involved disputes between states over surface water flowing through both states in a river, its tributaries or water sheds. Neither the parties to those cases, nor the Court questioned the individual states' sovereignty over the water while it resided within the state's borders; however, because the water naturally flowed through the boundaries of more than one state, each of those states claimed complete sovereignty over the moving water while it passed through its borders. The remedy of equitable apportionment was necessary in *Kansas v. Colorado*, 206 U.S. 46, 92 - 100 (1907) because both states asserted legitimate sovereign rights in the water of the Arkansas River. As the Court observed: "[b]efore either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States." *Id.* at 99. Exercising this sovereignty, each state had the authority to adopt and enforce different rules of law relating to the taking and use of the water while it remained within the state's borders; but the unconstrained exercise of complete sovereignty by one state with a legitimate claim to the flowing waters violated the cardinal rule of equality of right between those states. *Id.* at 97 - 98. These issues simply do not exist in Mississippi's case against Memphis and MLGW. Before either Mississippi or Tennessee was settled, the water to which Mississippi

claims ownership already resided in Mississippi, not Tennessee, and the ground water at issue falls solely under Mississippi's sovereignty. As a limited natural resource, the ground water in the aquifer was apportioned and each state's rights were established when the state lines of Tennessee and Mississippi were established.

B. Equitable Apportionment Is Neither a Required Nor an Appropriate Remedy in Mississippi's Civil Action

Mississippi has sued a municipality and its wholly owned utility for the wrongful taking of a natural resource belonging to Mississippi and its citizens. This is not the subject of the Court's equitable apportionment cases which acknowledge each separate state's sovereignty within its geographic boundaries as a natural resource belonging to the state; rather, these cases address a specific problem: while each state is free -- subject to Congress' power to regulate interstate commerce -- to exercise its sovereignty to regulate and control the water within its state, it may not impose its policies on another state through which such water also naturally flows. *Kansas v. Colorado*, 206 U.S. at 95. Nor may Congress impose laws resolving such a dispute between the sovereign states. *Id.* at 97. Accordingly, the Court must resolve disputes between the states arising from their exercise of their sovereign rights.

The District Court and the Fifth Circuit improperly dismissed Mississippi's case for failure to join Tennessee because Mississippi and Tennessee are not asserting conflicting rights. Both states assert sovereignty over the ground water within their state;

Mississippi did not sue Tennessee or challenge its sovereignty over ground water within Tennessee; and Tennessee never moved to intervene in Mississippi's suit against Memphis and MLGW, or objected to the jurisdiction of the District Court. When it filed its *amicus* brief in the Fifth Circuit, Tennessee acknowledged a state's sovereignty over the ground water within its borders and merely stated the position that, if an equitable apportionment action is instituted in the United States Supreme Court by Mississippi, Tennessee would be a party. Neither state contends that Mississippi's suit creates a controversy between Mississippi and Tennessee, and no claim for equitable apportionment has been raised, making the District Court's dismissal error.

Beyond the lack of any legal basis supporting Memphis and MLGW's desire to have part of Mississippi's ground water apportioned to Memphis, equitable apportionment is not an appropriate remedy for the wrong asserted by Mississippi. Equitable apportionment does not compensate for past legal wrongs; rather, it is solely designed to ensure a state its future share of a shared natural resource. *Idaho, ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025-26 (1983). Mississippi seeks damages for retroactive periods dating back forty years. Its damages will continue and increase as long as the present pumping by Memphis is maintained, expanding the cone of depression progressively further into Mississippi. Respondents cannot return or replace the converted water; it is forever lost to Mississippi, and it is impossible for any of the ground water in the aquifer to return or be replenished as long as MLGW continues pumping and expanding the cone of depression further into Mississippi. Without relief, the loss of Mississippi's

natural resources will never be compensated and will only increase.

In order to stop Memphis' taking of Mississippi's water, Memphis will have to shut down a majority of its wellfields and move them north and east out of its service area to contract the cone, or fund, construct and operate a river water treatment plant and distribution system extracting its water supply from the Mississippi River to substitute for the water being taken from Mississippi.[4]

II. THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH MISSISSIPPI'S DECISIONAL AND STATUTORY LAW APPLICABLE TO THE PRESERVATION AND MANAGEMENT OF ITS NATURAL RESOURCES

The Court has repeatedly recognized the authority of the states to adopt both common law and statutory regimes for the preservation, regulation and management of the natural resources within their boundaries, including both surface and ground water. In affirming the District Court's dismissal of Mississippi's action the Fifth Circuit failed to recognize and apply the Mississippi law governing ownership and use of the State's ground water.

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[4] The federal courts have authority to require utilities, like MLGW, to expend funds and construct and operate new facilities when necessary to recompense damages caused to another state. *See Wisconsin v. Illinois & Sanitary Dist. of Chicago*, 278 U.S. 367, 420-21 (1929) (Court, in original action, required non-state party sanitation district to provide sufficient funding and to construct and operate "with all reasonable expedition" adequate plants for sewage disposition rather than by lake diversions).

A. *Cinque Bambini* and Mississippi's "Omnibus Water Rights Act"

In *Cinque Bambini*, the Mississippi Supreme Court announced that the public trust doctrine applies to all the State's natural resources, including subterranean resources such as ground water. *Cinque Bambini* largely reaffirmed Mississippi's decisional law and policy establishing state ownership and control of the water resources within its borders for the beneficial use of the people of the State.[5] About the same time, Mississippi enacted its "Omnibus Water Rights Act" which declared and confirmed the State's ownership of all water sources within the State's borders.[6] These basic principles are codified in Mississippi's statutory

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[5] *See State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940) (State is the owner of water within its borders and incident to this ownership has a right and duty to police and protect it; court stresses police power connected with State's ownership in trust for the people); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) (State has power, as trustee, to bring a trespass action to recover value of subterranean resources removed from river bed).

[6] MISS. CODE ANN. §§51-3-1, *et seq.* (1985 & Supp. 2008) (Mississippi's 1985 Omnibus Water Rights Act codifies state ownership of ground water under the public trust). *See also* Mississippi's 1976 Ground Water Capacity Use Act, MISS. CODE ANN. §51-4-1 (1976) (declaring ground water to be among the State's basic resources subject to state control and development for the benefit of the people); Richard J. McLaughlin, "Mississippi" in 6 *Water and Water Rights*, 712 (Robert E. Beck, Ed., 1991, repl. vol. 2005) ("[b]oth surface water and ground water are regarded as property of the State of Mississippi.").

regulated riparian regime[7] which provides, in pertinent part:

> ***All water, whether occurring on the surface of the ground or underneath the surface of the ground, is hereby declared to be among the basic resources of this state and therefore belong to the people of this state***, and is subject to regulation in accordance with the provisions of this chapter. ***The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi.***

MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008) (emphasis, in bold italics, added). This statute reaffirms that, as the legal owner of its water resources, Mississippi has the power, authority, and fiduciary obligation, to take all steps necessary to protect ground water for its citizens' use.

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[7] Mississippi's adoption of regulated riparianism is part of a trend in a majority of eastern states to abandon antiquated 19th century riparian common law doctrines and replace those old legal systems with modern legislative regimes premised upon state ownership and management of water resources. *See generally* App., 57a - 60a. Such principles have long dominated water law and rights in all the western states. *See id.*, 60a-62a. *See also* American Society of Civil Engineers, "Regulated Riparian Model Water Code," Section 1-R-1-01 at 1 (2004) ("the waters of the State are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate and control the withdrawal and use of those waters").

The state boundaries superimpose a geopolitical grid over the territories occupied by the states overlying the geological formation making up the aquifer. In order to give full credence to the sovereignty retained in each state over its land and natural resources, the Court has recognized the state borders in determining the rights of the state and its citizens over the competing claims of citizens of abutting states.[8] The ground water underlying Mississippi belongs to Mississippi, the ground water underlying Tennessee belongs to Tennessee, and so on. The Fifth Circuit decision errs in equating the aquifer ground water to interstate surface waters. These distinctly different water resources have profoundly different behavior characteristics which determine the residence and ownership of the resource. The Fifth Circuit's decision overlooks the residence time of water within a particular geographic area. Surface water

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[8] *See Howard v. Ingersoll*, 54 U.S. 381 (1852). Ingersoll brought an action in the circuit court of Alabama (state court) to recover damages for wrongful obstruction by Howard of the Chattahoochee River which caused the waters of the river to flood Ingersoll's land and obstruct the use of his mill. While the underlying dispute involved private (non-state) claimants, the determinative issue, according to the Court, was one of boundary between the States of Georgia and Alabama. The Court held that the western line of Georgia was established upon the western bank of the Chattahoochee River and that, therefore, the river "resided" within Georgia's territorial boundaries. The Court sent the case back to state court, quoting from an earlier opinion by Chief Justice Marshall: "[W]hen a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly created State extends to the river only." 54 U.S. at 412.

has a very brief residency -- perhaps only hours or days -- as it flows freely across state lines. Even then, each state owns and controls the water resources while they exist or reside within that state's borders. In contrast, ground water has residency times that span millennia. The Mississippi ground water in the aquifer resided there for thousands of years and would have continued to reside in Mississippi for its citizens in the future but for MLGW's aggressive mechanical extractions from under Mississippi territory. Mississippi's ground water resource is not and has never been a shared resource under natural conditions.

B. The Fifth Circuit's Decision Effectively Abrogates the Public Trust Doctrine and Conflicts with the Laws of All States Regarding State Ownership and Control of Water Resources.

All states trace their sovereign ownership and rights to manage and preserve their water resources to the public trust. Mississippi's sovereign authority and responsibility over its natural resources as recognized in *Cinque Bambini*, *Louis Fritz* and *Stewart* comports with federal and state authorities from a majority of states. Mississippi's Omnibus Water Rights Act codifying the public trust and the State's sovereign role as trustee is also consistent with legislative enactments and constitutional provisions of other states. A compilation of numerous decisions, statutes and constitutional provisions from thirty-five states may be referenced at App., 54a-62a. These state laws are firmly rooted in this Court's cases overlooked by the Court of Appeals. *See* note 3 & accompanying text *supra*.

Under the United States Constitution as read by the Court, the ground water in the aquifer which is the subject of Mississippi's federal court action became the property and responsibility of Mississippi at the time it was admitted to the Union as one of these United States; accordingly, there is nothing to apportion. Taken to its logical conclusion, the Fifth Circuit's decision appears to suggest that this Court's decisions assert an Article III right and obligation of the Court to "equitably reallocate" one state's natural resources to a municipality across the state line in another state. This is certainly the essence of Memphis' argument with which it obtained the dismissal of the District Court case; however, there is no Constitutional basis for any such claim.

III. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF THE COURT AND THEIR APPLICATION BY THE ELEVENTH AND EIGHTH CIRCUITS LIMITING THE COURT'S EXERCISE OF ITS ORIGINAL AND EXCLUSIVE JURISDICTION UNDER U.S. CONST. ART. III, SECTION 2 AND 28 U.S.C. §1251(a).

Mississippi claims that Memphis and MLGW have mechanically extracted and converted ground water naturally residing within Mississippi's territorial boundaries through the medium of the aquifer, an interstate geological formation. Under *Illinois v. Milwaukee*, 406 U.S. 91 (1972), these claims involving a transboundary dispute between a state and a municipality and public utility in another state, both non-state entities, conferred federal question

jurisdiction[9] on the District Court. Because the action does not involve two states, it is not within the original and exclusive jurisdiction of the United States Supreme Court and the proper, available forum is the District Court. *Illinois v. Milwaukee*, *supra* at 97, 103-08; *Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1130 (11th Cir. 2005) ("*Alabama II*"); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003), *cert. den.*, 541 U.S. 987 (2004); *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1254-55 (11th Cir. 2002); *Alabama v. United States Army Corps of Engineers*, 382 F.Supp.2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*").

The Fifth Circuit's position -- that a dispute over ground water residing in a deep confined aquifer is automatically "between two states" -- ignores the

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[9] The interstate nature of the sand formation comprising the aquifer conferred federal question jurisdiction on the District Court. *Illinois*, *supra*, at 104-07; *Hinderlider v. LaPlata Co.*, 304 U.S. 92, 110 (1938); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Mississippi's claims are governed by federal common law because of the transboundary character of the aquifer. Federal courts have long recognized the need to create and apply federal common law in a variety of claims including trespass, conversion, unjust enrichment and injunctive relief as sought by Mississippi. Thus, it is the interstate context that actually gives rise to the District Court's subject matter jurisdiction in a manner consistent with the decisions of the Court and the Eighth and Eleventh Circuits relied on herein. State law will be adopted as the federal rule in fashioning federal common law remedies for Mississippi's claims. *Compare Illinois*, *supra*, at 107 (state's standards relevant and considered in dispute resolution) *with Central Pines Land Co. v. United States*, 274 F.3d 881, 890 nn. 32 & 34, 892-93 & n. 49 (5th Cir. 2001) (state law borrowed as the federal rule of decision).

undisputed geology and hydrogeology. This broad formulation also ignores the distinction between sovereign governments and their citizens which have been recognized by this Court and the Eleventh and Eighth Circuits in cases involving water quality and allocation disputes. *Illinois*, *supra* at 97-98, 108 (Supreme Court declined to exercise §1251(a) jurisdiction holding that Wisconsin was not a mandatory party in Illinois' suit against Milwaukee over pollution of Lake Michigan); *Alabama II*, *supra*, at 1130 (Eleventh Circuit held that Alabama's water supply allocation suit against Corps of Engineers involving Lake Lanier with Georgia and Florida on opposite sides of case did not deprive district court of jurisdiction under §1251(a)); *Ubbelohde*, *supra*, at 1025-26 (Eighth Circuit held water quantity controversy between South Dakota and Corps involving releases from Missouri River where Nebraska sought intervention did not trigger §1251(a) to strip district court of jurisdiction despite states' adverse interests); *Georgia*, *supra*, at 1254-55 (Eleventh Circuit held intervention of Florida and utility in Georgia's water quantity action against Corps did not invoke §1251(a) jurisdiction of Supreme Court); *Alabama I*, *supra*, at 1309-10 (Georgia's "argument that 'interstate water disputes' automatically fall within the Supreme Court's original exclusive jurisdiction because the general subject implicates states' competing interests in water is misplaced"). The Fifth Circuit's decision conflicts with governing decisions from this Court and the Eighth and Eleventh Circuit Courts of Appeals.

There are two basic flaws in the Fifth Circuit's rejection of Mississippi's authorities on this issue. First, this is <u>not</u> a state versus state controversy;

rather, Mississippi sued Memphis, a political subdivision of Tennessee, and its utility division, MLGW, both of which are non-state entities. The Eighth and Eleventh Circuits' cases involved state actions against the Corps of Engineers, a non-state entity; however, neither the presence, nor potential intervention or participation, of state parties divested the district courts of jurisdiction in *Alabama II* (Eleventh Circuit), *Ubbelohde* (Eighth Circuit), or in this Court's seminal ruling in *Illinois v. Milwaukee*. The instant action presents an even clearer example of a state versus non-state entities. Second, there is an available forum in which this matter is already prepared for trial and complete adjudication of the issues may be obtained -- the U.S. District Court for the Northern District of Mississippi.

These two essential factors, rigorously applied in evaluating the Court's exercise of jurisdiction under Section 1251(a), were not given proper attention by the Fifth Circuit. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1991), this Court held that to constitute a proper controversy under 28 U.S.C. §1251(a), it must appear that the complaining state has suffered wrong through the action of the other state, furnishing ground for judicial redress, or is asserting a right against the other state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. *Wyoming v. Oklahoma*, 502 U.S. at 447, *citing Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (*quoting Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)); *see also New York v. Louisiana*, 274 U.S. 488, 490 (1927).

For this action to be characterized as a dispute "between states," Mississippi must seek relief against Tennessee for wrongs caused by Tennessee's actions. *See Mississippi v. Louisiana*, 506 U.S. 73, 78 n. 2 (1992) ("Louisiana's intervention is also unaffected by §1251(a) because it does not seek relief against Mississippi."); *United States v. Nevada*, 412 U.S. 534, 537 (1973) (where two states with opposing interests in federal water allocation suit did not seek relief from one another, case fell outside §1251(a) jurisdiction).

Mississippi seeks damages against Memphis and MLGW only and has made no claim against Tennessee. Nor does Tennessee have any adverse claim against Mississippi. Other circuits in water quantity and quality cases have held that "[a] controversy between two or more states exists only when, unlike this case at this time, the states are actually seeking relief from one another." *Alabama I*, *supra*, at 1311. *See also Alabama II*, *supra*, at 1130 (to invoke Supreme Court's §1251(a) jurisdiction, plaintiff state must first demonstrate that injury for which redress is sought was directly caused by actions of another state, *quoting Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976)); *Ubbelohde*, *supra*, at 1025-26 (same); *Georgia*, *supra*, at 1256 n. 11 (same).

The Fifth Circuit's conflict with decisions of this Court and other federal circuits stems from its assumption that ground water residing in any, however slightly permeable, interstate geological formation must, by definition, be a shared resource of all states overlying that formation. This leap from the apportionment of free flowing interstate surface water jointly claimed by two sovereign states, to a city's mechanical extraction of prehistoric water residing in

another state and to which its own state makes no claim, finds no support in the law. Tennessee's rights and interests are not implicated solely because the ground water being siphoned from Mississippi by Memphis must travel through a transboundary geological formation. Because Mississippi owns the ground water naturally residing in the State as sovereign and Mississippi's claims do not cover any ground water which would ever naturally reside in Tennessee, this action does not concern competing claims of states against one another. *See Alabama II*, *supra*, at 1130 (suit must involve controversy between states based on damages to one state directly caused by the other state); *see also Georgia*, *supra*, at 1248, 1254-55 (Florida argued that Georgia was seeking to effect *de facto* apportionment in water quantity allocation dispute over interstate water basins; district court allowed intervention, but retained subject matter jurisdiction as Florida may not be able to protect its interests in Supreme Court equitable apportionment action).

Illinois v. Milwaukee squarely addresses and controls the question presented. *Illinois* was an action by a state (Illinois) against a municipality (Milwaukee) and certain sewerage commissions involving water pollution. This Court declined to exercise its §1251(a) jurisdiction and remitted the parties to the district court which had jurisdiction over the parties and could provide complete relief without joinder of other affected states. 406 U.S. at 107. The recent decisions in *Alabama I & II*, *Georgia* and *Ubbelohde*, *supra*, follow the logic of *Illinois*. *See also Connecticut v. Cahill*, 217 F.3d 93, 95, 104-05 (2nd Cir. 2000) (New York's sovereignty not implicated as no relief sought that would require state to disburse funds from its

treasury to Connecticut; §1251(a) jurisdiction not invoked as suit not "between two or more States"); *accord*, *California v. Nevada*, 447 U.S. 125, 133 (1980) (because matter did not involve dispute between California and Nevada, it did not fall in Supreme Court's original jurisdiction); *North Dakota v. Minnesota*, 263 U.S. 365, 371-72, 378 (1923) (bill dismissed as Minnesota not responsible for flooding in North Dakota).

These cases recognize that 28 U.S.C. §1251 circumscribes the Supreme Court's original jurisdiction based on the identity of the parties to a dispute, not based on the subject of the dispute between the parties. In *Alabama I*, *supra*, the court observed that even when states are in conflict, the Supreme Court's original jurisdiction is not necessarily implicated:

> Just because states pursue opposing interests in a case does not necessarily mean a "controversy" exists between or among them, or that the Supreme Court will exercise original jurisdiction.

Id. at 1310. In deciding whether to accept an action -- even one clearly within its original jurisdiction -- the Supreme Court considers two factors: "the nature of the interest of the complaining state" and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

The Court exercises its original jurisdiction only very sparingly. *See id.*; *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v. Louisiana*, 451 U.S.

725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). It will only exercise jurisdiction in "serious" cases such as would amount to *casus belli* if the states were fully sovereign. *Mississippi*, 506 U.S. at 77; *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983); *Alabama I*, *supra*, at 1311. *See also Illinois*, *supra*, at 93-94 (§1251(a) jurisdiction obligatory only in cases of seriousness); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) (original jurisdiction exercised only when necessity is absolute). The exclusive jurisdiction of the Supreme Court is limited to cases in which the states are and remain opponents in the controversy, regardless of their formal alignment. *Alabama I*, *supra*, at 1310, *citing United States v. Nevada*, 412 U.S. 534, 538-40 (1973); *California v. Nevada*, 447 U.S. 125, 133 (1980). Simply stated, it is essential that the complaining state has suffered a wrong through the action of the other state. *Alabama II*, *supra*, at 1130; *Georgia*, *supra*, at 1256 n. 11 (*quoting Massachusetts v. Missouri*, 308 U.S. 1 (1939)); *Alabama I*, *supra*, at 1311, *citing Mississippi*, 506 U.S. at 78 n. 2; *United States v. Nevada*, 412 U.S. 534, 537 (1973) (*per curiam*) and relying on *Ubbelohde*, 330 F.3d at 1025-26, and *Georgia*, 302 F.3d at 1256 n. 11. As Mississippi and Tennessee have neither asserted a wrong nor sought any relief against one another for injury directly caused by either state, the first factor governing exercise of Supreme Court original jurisdiction cannot be demonstrated.

The second factor -- availability of an alternative forum -- mandates reversal of the Fifth Circuit. Mississippi's common law tort action for damages against the sole tortfeasors, Memphis and MLGW, may be heard in the District Court which has

jurisdiction over the parties and authority to grant complete relief to those parties already present in the case. *See Mississippi*, 506 U.S. at 77; *Texas*, 462 U.S. at 571 n. 18; *Arizona*, 425 U.S. at 797; *Illinois*, 406 U.S. at 93; *Georgia*, 302 F.3d at 1254-55; *Alabama I* at 1311. Accordingly, this Court's original, exclusive jurisdiction under §1251(a) is not invoked by Mississippi's claims and the Fifth Circuit should be reversed to resolve the conflict between the Circuits and with this Court's decisions.

IV. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE REGARDING THE SOVEREIGN RIGHTS OF MISSISSIPPI AND ALL OTHER STATES TO OWNERSHIP AND CONTROL OF STATE WATER RESOURCES.

The Court should grant certiorari because the core issues implicate the sovereign rights and powers of all states and impact significant property rights and pecuniary interests.

Mississippi's claims are based on its ownership of all water resources within its territorial boundaries. Mississippi, like every state in the United States, entered the Union on "equal footing" with the original thirteen colonies and was presumed to be endowed with the same self-evident, inalienable rights and privileges, including sovereignty with respect to all waters and other natural resources within their borders. *See Phillips Petroleum*, 484 U.S. at 479; *Oregon*, 429 U.S. at 378; *Illinois Centr.*, 146 U.S. at 452; *Pollard*, 44 U.S. at 222-23; *Waddell's Lessee*, 41 U.S. at 410. All states, including Mississippi, have declared sovereignty and plenary authority over water resources within their boundaries, including

subterranean ground water. *Cinque Bambini*, 491 So.2d 508, 511-14, 516-17 & 519-20 (affirmed by this Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988)), MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008). The Fifth Circuit's decision -- which effectively declares that Mississippi does not own the State's ground water resources -- would, if affirmed, have the pernicious effect of abrogating the public trust doctrine and undermining the constitutional, statutory and decisional laws of most, if not all, states of the Union which rest on the rights and powers retained by the states under the United States Constitution. *See* App., 54a - 62a.

The water rights laws and water management policies of Mississippi and the remaining forty-nine states are grounded historically in the public trust doctrine arising from the retained sovereignty of the states. The Fifth Circuit's decision is in conflict with these fundamental precepts applying to all states. The Court has granted certiorari to review decisions of circuit courts of appeals in matters where the interests of other states may be affected. *See New York v. Ferber*, 458 U.S. 747, 749 n. 2 (1982) (Court noted that statute in question had identical or similar counterparts in statutes in forty-seven other states); *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (Court granted certiorari (364 U.S. 811) because of importance of the ruling to the new state of Alaska); *New York v. O'Neill*, 359 U.S. 1, 3 (1958) (Court granted certiorari (356 U.S. 972) inasmuch as holding brought into question the constitutionality of statute enforced in forty-two states and the Commonwealth of Puerto Rico); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957) (Court granted certiorari to Texas Court of Appeals (352 U.S. 925) because case raised

important question, not only to California, but to other states which have similar laws); *New York v. United States*, 326 U.S. 572, 547 (1946) (Court granted certiorari to Second Circuit (322 U.S. 724) in matter involving state's sales of waters or other disposition of natural resources under laws similar to other states). On these authorities, this Court should grant Mississippi's petition.

Mississippi's claims also involve significant property rights governed by State law. *Oregon*, 429 U.S. at 378-82; *Cinque Bambini*, 491 So.2d at 513, 516-19. The ground water which has underlain Mississippi for thousands of years, now being wrongfully extracted from Mississippi by Memphis and MLGW through mechanical means, represents a valuable property residing in the State under the Constitution. In its action, Mississippi seeks recovery of more than one billion dollars in compensatory damages and prejudgment interest.[10]

This Court has often granted certiorari in matters involving important questions of liability for substantial monetary damages or where significant property interests were in dispute. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n. 7 (1982) (Court granted certiorari because of an important question of government's liability for monetary damages for breach of trust in connection with management of

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[10] Details regarding the bases for and derivation of Mississippi's damages may be reviewed in the excerpts from expert economic reports prepared by Dr. William G. Foster and Dr. William W. Wade annexed as Exhibits 3 & 4 to "Appendix G" at 118a-188a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition.

forest resources allotted lands of Quinault Indian Reservation); *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (Court granted certiorari to Tenth Circuit (442 U.S. 982) because dispute involved disposition of vast amounts of public lands amounting to over 500,000 acres in state claim to right to select valuable oil shale lands in lieu of lost school lands); *Commissioner of Internal Revenue v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 nn. 4 & 5 (1977) (Court granted certiorari to Tenth Circuit (429 U.S. 814) because decision conflicted with Fourth, Fifth, Sixth and Seventh Circuits and involved an important liability question with more than one hundred million dollars in dispute); *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 224-25 (1959) (Court granted certiorari in view of fiscal importance of question to State of Alaska); *United States v. Zazove*, 334 U.S. 602, 613-14 n. 17 (1948) (certiorari granted to Seventh Circuit in matter involving potential liability amounting to billions of dollars).

The Fifth Circuit's judgment in Mississippi's action implicates all of these important issues and provides the Court with an opportunity to address them in an area of national importance to every state in the Union: the states' rights in ground water resources.

CONCLUSION

In accordance with the foregoing, Mississippi respectfully requests the Court to grant its Petition for Writ of Certiorari and for such other and further relief to which Mississippi may, in equity and good conscience, be entitled.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-60152

[Filed June 5, 2009]

JIM HOOD, Attorney General, ex rel; STATE OF MISSISSIPPI, Acting for Itself and Parens Patriae for and on behalf of the People of the State of Mississippi

Plaintiffs-Appellants

v.

THE CITY OF MEMPHIS, TENNESSEE; MEMPHIS LIGHT GAS & WATER DIVISION

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Mississippi

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this lawsuit, the state of Mississippi seeks damages from the City of Memphis and Memphis Light, Gas and Water ("MLGW") (collectively, "Memphis"), for the alleged conversion of groundwater in the Memphis Sands Aquifer (the "Aquifer"). The district court dismissed Mississippi's lawsuit without prejudice, holding that Tennessee is an indispensable party to the suit and that the court was without power to join Tennessee. We AFFIRM.

I. BACKGROUND

The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas. There is no interstate compact governing use of the Aquifer's water, and thus no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas. The Aquifer is the primary water source for both DeSoto County, Mississippi, and the city of Memphis, Tennessee, which lies just across the state line from DeSoto County. Mississippi seeks past and future damages, as well as equitable relief, related to Memphis's allegedly wrongful appropriation of groundwater from the Aquifer.[1] Mississippi alleges that part of the groundwater that Memphis pumps from the Aquifer is Mississippi's sovereign property and that the state must therefore be compensated.

MLGW, a division of the City of Memphis, owns and operates one of the largest artesian water systems

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[1] Although there was some dispute between the parties below as to the basis of jurisdiction, federal question jurisdiction is present both because 28 U.S.C. § 1331(a) includes suits brought by a state and because federal common law will apply to the dispute. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972).

in the world. It is responsible for providing gas, electricity, and water to its residential, business, governmental, and other customers, who are primarily citizens of Memphis. Although three of its groundwater well fields are located near the Tennessee border, all of MLGW's wells are located within Tennessee, and Memphis and Tennessee contend that this municipal water program operates under the direction and control of Tennessee law.[2]

Mississippi asserts that MLGW's groundwater pumping has created an underground "cone of depression" centered under Memphis and extending into Mississippi. Mississippi states that this cone of depression causes groundwater that would otherwise lie beneath Mississippi to flow across the border and into the cone under Tennessee, and thus become available to be pumped by Memphis. Mississippi argues that due to the growth of Memphis's water system the Aquifer is being drawn down at a higher rate than it is being replenished, thus causing water levels to drop.

Mississippi filed its first complaint against Memphis in February 2005. Memphis filed a motion to dismiss on several bases, including that the state of Tennessee was an indispensable party pursuant to

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[2] *See, e.g.*, TENN. CODE ANN. § 68-221-707 (Tennessee Department of Environment and Conservation exercises supervision over operation of public water systems, including features of operation that affect quantity of water supplied). Mississippi contends that Memphis's groundwater pumping is not controlled by Tennessee law, but cites no legal authority for that conclusion, and neither does it address the provisions of Tennessee law cited in Memphis's brief.

Federal Rule of Civil Procedure 19. The motion to dismiss was denied in August 2005. Memphis then moved to "amend" the district court's order or to certify an interlocutory appeal. Construing the motion to amend as a motion for rehearing, the district court denied both motions in September 2005. Memphis filed an answer and subsequent amended answer. Mississippi filed an amended complaint in October 2006, eliminating certain claims and clarifying its request for an award of monetary damages for Memphis's alleged misappropriation of Mississippi's groundwater.

In June 2007, Memphis moved for judgment on the pleadings, again arguing that Tennessee was an indispensable party to the suit. Memphis also moved for partial summary judgment on several of Mississippi's claims. In September 2007, the court denied the motions.

In late January 2008, shortly before the bench trial was to start, the district court announced that it had decided *sua sponte* to revisit the issue of Tennessee's possible status as an indispensable party and thus the court's subject-matter jurisdiction. After briefing from the parties and oral argument, the district court dismissed the suit for failure to include Tennessee, an indispensable party.[3] Mississippi appeals.

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[3] In its opinion dismissing this suit, the district court directed that the Arkansas Attorney General should be put on notice of the pendency of this action and any future action filed in the U.S. Supreme Court, although the court refrained from determining whether Arkansas is also an indispensable party.

II. DISCUSSION

A. Standard of Review

We review the district court's decision to dismiss for failure to join an indispensable party for an abuse of discretion. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438-39 (5th Cir. 2003). Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and "[Federal Rule of Civil Procedure] 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be." *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 2006). However, "[a] court abuses its discretion when its ruling is based on an erroneous view of the law." *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995).

Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a

> substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1). While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after "an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." *Pulitzer-Polster*, 784 F.2d at 1309.

If the necessary party cannot be joined without destroying subject-matter jurisdiction, the court must then determine whether that person is "indispensable," that is, whether litigation can be properly pursued without the absent party. *HS Res.*, 327 F.3d at 439. The factors that the district court is to consider in making this determination are laid out in Rule 19(b):

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by; (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

Mississippi contends that the district court misapplied Rule 19 in holding that Tennessee is a necessary and indispensable party because its suit does not implicate any sovereign interest of Tennessee. Mississippi argues that its suit does not require an equitable apportionment of the Aquifer because the state owns the groundwater resources of the state as a self-evident attribute of statehood, and thus there is no interstate water to be equitably apportioned. Mississippi further argues that it is not seeking relief for damages caused by the direct actions of Tennessee, and therefore the suit is not an action between states invoking the original jurisdiction of the Supreme Court.

Memphis responds that the district court correctly determined that the nature of Mississippi's claims and asserted ownership of a water resource that it shares with Tennessee makes Tennessee an indispensable party to suit. Memphis argues that because Tennessee's sovereign ownership rights in the Aquifer water, the same which Mississippi seeks to protect, are implicated, the case cannot be properly resolved without Tennessee's participation. Memphis points to a century of Supreme Court case law addressing the equitable apportionment of interstate waters among states to argue that the district court correctly held that joining Tennessee would create a suit between states that must be filed in the Supreme Court.[4]

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[4] Tennessee, participating in this appeal as *amicus curiae*, asserts that it has a sovereign interest in its share of Aquifer water as great as that asserted by Mississippi, and it therefore is a necessary and indispensable party to any suit over Memphis's withdrawals from the Aquifer.

B. Tennessee is a Necessary Party to this Water Ownership Dispute

The district court held that Tennessee was a necessary party under Rule 19(a)(1) because in its absence complete relief could not be accorded between Memphis and Mississippi. The court explained that it could not determine whether Memphis had misappropriated water from the Aquifer without determining *what portion* of the Aquifer belongs to Mississippi and Tennessee respectively, and thus an equitable apportionment of the Aquifer between the states was required. In so holding, the district court rejected Mississippi's argument, renewed on appeal, that only Mississippi's water is at issue. Mississippi's fundamental argument as to why Tennessee's presence in the lawsuit is unnecessary is that the Aquifer's water is not an interstate resource subject to equitable apportionment, and therefore Tennessee's sovereign interests are not implicated by the suit.

We find that the district court made no error of law as to the necessity of equitably apportioning the Aquifer. The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share. *See Hinterlander v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938). Allocation of an interstate water source is accomplished through a compact approved by Congress or an equitable apportionment. *Id.*

"Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an

interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The Supreme Court has described the applicability of this doctrine in broad terms:

> [W]henever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas v. Colorado, 206 U.S. 46, 97-98 (1907). Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine. The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The Aquifer flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1 (1995) (allocation of North Platte River); *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980) (amending order allocating usage of portions of Lake Michigan).[5]

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[5] A handful of Supreme Court cases mention aquifers in the context of interstate water disputes. *See Texas v. New Mexico*, 462 U.S. 554, 556-57, n.1, 2 (1983) (discussing role of New Mexico aquifers feeding the Pecos River, subject of litigation, and possible detrimental effects of pumping); *Wisconsin*, 449 U.S. at 50 (court order amending prior decree with requirements including "to the

Mississippi argues that it owns a fixed portion of the Aquifer because it controls the resources within its state boundaries, citing to Mississippi and federal law demonstrating the state's sovereign rights over the soil, forest, minerals, etc. Despite Mississippi's contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries. The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.[6] *See, e.g.*, *Hinterlander*, 304 U.S. at 102 (Colorado's contention that it "rightfully may divert and use . . . the waters flowing within her boundaries in this interstate stream . . . cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other,"

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extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer"). While these opinions do not address aquifer allocation directly, the fact that the aquifers were not treated differently from any other part of the interstate water supply subject to litigation supports the conclusion that the Aquifer at issue must be apportioned.

[6] Notably, the equitable apportionment doctrine has been used to address other migratory interstate resources, including the apportionment of fish that make an interstate migration. *See Idaho v. Oregon*, 462 U.S. 1017, 1024 (1983) ("Although that doctrine has its roots in water rights litigation, the natural resource of [migratory salmon] is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.").

quoting *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922)).

The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation. Therefore, we find no error in the district court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis. *See Pulitzer-Polster*, 784 F.2d at 1309.

C. Tennessee's Joinder Would Destroy Subject-Matter Jurisdiction

After finding Tennessee to be a necessary party, the district court held that it was without power to join the state because original and exclusive jurisdiction over a suit between Mississippi and Tennessee would reside in the United States Supreme Court. *See* 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Mississippi argues that even if Tennessee's presence in the suit is necessary, it does not invoke the Supreme Court's original jurisdiction, and the district court could therefore retain jurisdiction over the case. We disagree.

Mississippi argues that the district court has subject-matter jurisdiction because this suit is only against Memphis, not Tennessee, and would at most be subject to the Supreme Court's original but non-exclusive jurisdiction. *See* 28 U.S.C. § 1251(b)(3) ("The Supreme Court shall have original but not exclusive jurisdiction of . . . All actions or proceedings by a State against the citizens of another State."). The

Supreme Court has in the past stated a preference that such suits be brought in the district court in the first instance. *See United States v. Nevada*, 412 U.S. 534, 538 (1973). Mississippi's argument that its suit is not against Tennessee hangs on the assertion that only Memphis's actions, and not Tennessee's, are at issue. *See Milwaukee*, 406 U.S. at 97 (holding that where Illinois sued Milwaukee for polluting Lake Michigan, not mandatory to sue Wisconsin as well). However, that contention ignores that, in contrast to *Milwaukee*, this suit requires an allocation of water rights between states: Memphis's actions are not wrongful unless there is a defined allocation of water that it is allowed to pump. Tennessee is a necessary party under Rule 19(a) on that basis, and the suit is thus one between two states.

Mississippi correctly argues that a suit involving interstate water does not *automatically* invoke the jurisdiction of the Supreme Court and strip the district court of jurisdiction. However, the cases to which Mississippi analogizes are distinguishable. Four cases upon which Mississippi relies most heavily are suits against the U.S. Army Corps of Engineers ("Corps of Engineers"), not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a). *See Alabama v. U.S. Army Corps of Eng's*, 424 F.3d 1117, 1130 (11th Cir. 2005) ("*Alabama II*") (recognizing that Alabama's suit against the Corps of Engineers was not a dispute between states, despite intervention of other states as parties, because the litigation was over how the Corps of Engineers should fulfill its obligations under federal law); *Georgia v. U.S. Army Corps of Eng's*, 302 F.3d 1242, 1254-55 (11th Cir. 2002) (same); *Alabama v. U.S. Army Corps of Eng's*, 382 F. Supp. 2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*") (same);

also South Dakota v. Ubbelohde, 330 F.3d 1014, 1025-26 (8th Cir. 2003) (same).

Mississippi also relies heavily on *Milwaukee v. Illinois*, the case that the district court identified as the basis for its earlier rulings denying Memphis's arguments that Tennessee is an indispensable party. 406 U.S. 91 (1972). *Milwaukee* is distinguishable. *Milwaukee* involved a federal common law nuisance action to stop alleged pollution of Lake Michigan by the city of Milwaukee's sewage disposal practices. The Supreme Court denied Illinois's motion for leave to file a bill of complaint against Wisconsin, holding that the action did not trigger the Supreme Court's exclusive jurisdiction. The Court found that, under appropriate pleadings, Wisconsin could be joined as a defendant, but that it was not a mandatory defendant on the facts of the case. *Id.* at 97. The Court concluded that the case fell under 28 U.S.C. § 1251(b)(3), giving the Supreme Court original but not exclusive jurisdiction over certain actions, and therefore Illinois could and should file suit in the appropriate federal district court. *Id.* at 108.

Mississippi argues that *Milwaukee* is a more analogous case than the water-allocation cases because Mississippi, like Illinois, merely seeks to enjoin the actions of the city of Memphis and does not have any claim against Tennessee as a state. Mississippi's argument fails, however, because of the crucial factual difference between the two cases: *Milwaukee* involved stopping the pollution of what was agreed to be an interstate water body, while Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently

utilizes pursuant to Tennessee law. *See, e.g.*, TENN. CODE ANN. § 68-221-707(a)-(b) ("The [Tennessee Department of Environment and Conservation] shall exercise general supervision over the operation and maintenance of public water systems throughout the state. . . . [including] all the features of operation and maintenance which do or may affect the quality or quantity of the water supplied."). Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis. *Cf. Colorado v. Kansas*, 320 U.S. at 393 (noting that controversy between states over rightful shares of the Arkansas River "is not to be determined as if it were one between two private riparian proprietors or appropriators"); *Kansas v. Colorado*, 206 U.S. at 100 (noting the court must consider the effect that one state's increased share of water has on another state in order to determine amount of water each is entitled to from river).

Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).

D. There Was No Abuse of Discretion in Dismissing the Suit

Having concluded that Tennessee is a necessary party whose joinder would deprive the district court of subject-matter jurisdiction, we turn to whether the district court abused its discretion in dismissing the suit under Rule 19(b). When assessing the Rule 19(b) factors, the relevant inquiry is "whether, in equity and good conscience, the action should proceed among the

existing parties or should be dismissed." FED. R. CIV. P. 19(b); *see Pulitzer-Polster*, 784 F.2d at 1312 ("[W]e must assess the factors set out in Rule 19(b), seeking to avoid manifest injustice while taking full cognizance of the practicalities involved.").

We find no abuse of discretion in the district court's determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed. Clearly a judgment rendered in Tennessee's absence would be enormously prejudicial to Tennessee's sovereign interest in its water rights. The specter of a determination of Tennessee's water rights without the its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party. *Cf. Hinterlider*, 304 U.S. at 106-07 (noting that judicial apportionment of water from an interstate stream is binding on all water claimants from each state); *New Jersey v. New York*, 283 U.S. 336, 346 (1931) ("[A river] offers a necessity of life that must be rationed among those that have power over it. . . . Both States have real and substantial interests in the River that must be reconciled as best they may."). Further, there was no error in the district court's finding that it could not fashion restrictions in the judgment so as to avoid the threat of prejudice to Tennessee's sovereign interests or that a judgment rendered without Tennessee's participation would be inadequate. *Cf. Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983) ("[W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them. . . ."); *Colorado v. Kansas*, 320 U.S. at 392 ("The reason for judicial caution in

adjudicating the relative rights of states [to shares of interstate water] is that . . . they involve the interests of quasi-sovereigns, [and] present complicated and delicate questions. . . .").

Finally, Mississippi will have an adequate remedy despite this suit's dismissal. *See* 28 U.S.C. § 1251(a). In an equitable apportionment action, the Supreme Court might take one of several actions, such as concluding that the existing withdrawals of groundwater from the Aquifer in Tennessee are appropriate or limiting the total volume of Aquifer water that may be withdrawn by either party. *See Colorado v. Kansas*, 320 U.S. at 391; *New Jersey*, 283 U.S. at 346.[7]

III. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

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[7] Of course, the parties might also negotiate an interstate compact allocating the resource going forward rather than continue litigation. *See Colorado v. Kansas*, 320 U.S. at 392 (encouraging the parties to seek a negotiated, political solution rather than requiring the Supreme Court to make a necessarily imperfect determination).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60152
D.C. Docket No. 2:05-CV-32

[Filed June 5, 2009]

JIM HOOD, Attorney General, ex rel; STATE OF MISSISSIPPI, Acting for Itself and Parens Patriae for and on behalf of the People of the State of Mississippi	)
Plaintiffs-Appellants	)
v.	)
THE CITY OF MEMPHIS, TENNESSEE; MEMPHIS LIGHT GAS & WATER DIVISION	)
Defendants-Appellees	)

Appeal from the United States District Court
for the Northern District of Mississippi

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUN 29 2009

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit
By: /s/
Deputy

New Orleans, Louisiana JUN 29 2009

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. 2:05CV32-D-B

[Filed February 6, 2008]

JIM HOOD, Attorney General, *ex rel.*, THE STATE OF MISSISSIPPI, acting for itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi	)
PLAINTIFF	)
vs.	)
THE CITY OF MEMPHIS, TENNESSEE; and MEMPHIS LIGHT, GAS & WATER DIVISION	)
DEFENDANTS	)

BENCH OPINION DISMISSING ACTION WITHOUT PREJUDICE

The United States Supreme Court held, in Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 101-102 (1998), that Article III generally

requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case and that "for a court to pronounce upon [the merits] when it has no jurisdiction to do so is for a court to act *ultra vires*." See also Villarreal v. Smith, 201 Fed. Appx. 192, 194 (5th Cir. 2006) ("A federal court has the affirmative duty to inquire into jurisdiction whenever the possibility of a lack of jurisdiction arises."); Warren v. United States, 874 F.2d 280, 281-82 (5th Cir. 1989) (holding that "federal courts are under a continuing duty to inquire into the basis of jurisdiction ..."); Giannakos v. M/V Bravo Trader, 762 F.2d 1295, 1297 (5th Cir. 1985) ("United States District Courts . . . have the responsibility to consider the question of subject matter jurisdiction *sua sponte* . . . and to dismiss any action if such jurisdiction is lacking."); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Discussion

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants' alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer.

Although it is the Defendants that seek a ruling that the State of Tennessee is an indispensable party to this action, "when an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5th Cir. 1986). Because the court has indicated that a possibly necessary party

is absent from this action, the burden of disputing joinder falls on the Plaintiff.

Rule 19(a) of the Federal Rules of Civil Procedure provides in part that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(b) states that:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors a court should consider in determining whether a party is indispensable include: first, to what extent a judgment rendered in the person's absence

> might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Under Rule 19, the court's analysis is conducted as follows:

> The court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). Rather, the decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. If joinder under Rule 19(a) is not feasible because, e.g., it will deprive the court of subject matter jurisdiction, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward (without the absentee) or must be dismissed, the absent person being thus regarded as indispensable.

Faloon v. Sunburst Bank, 158 F.R.D. 378, 380 (N.D. Miss. 1994).

While there are apparently no reported cases dealing with interstate subsurface water or aquifers, it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi.

In applying the dictates of Rule 19 to the facts of this case, the court holds that the State of Tennessee is a necessary and indispensable party. First, the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved. The United States Supreme Court has held that it possesses a "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." Arizona v. California, 373 U.S. 546, 564 (1963); *see* Texas v. New Mexico, 462 U.S. 554, 567 (1983) (The Supreme Court held that "[t]here is no doubt that this court's jurisdiction to resolve controversies between two states . . . extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows . . .").

The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of

which State. It is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto* apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee. Throughout the years, the Supreme Court has adjudicated many such disputes pursuant to its original and exclusive jurisdiction, including one between the States of Mississippi and Louisiana involving the Mississippi River. See, e.g., Louisiana v. Mississippi, 516 U.S. 22 (1995); Mississippi v. Louisiana, 506 U.S. 73 (1992); Virginia v. Maryland, 540 U.S. 56 (2003); Kansas v. Colorado, 514 U.S. 673 (1995); Nebraska v. Wyoming, 515 U.S. 1 (1995); Colorado v. New Mexico, 467 U.S. 310 (1984); Arizona v. California, 373 U.S. 546 (1963); New Jersey v. New York, 345 U.S. 369 (1953); Nebraska v. Wyoming, 325 U.S. 665 (1945); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 206 U.S. 46 (1907). In another analogous case, the Fifth Circuit held that the United States was an indispensable party in a suit filed by a Texas municipality and other individual landowners against several defendants who claimed irrigation rights to the Rio Grande River; while the Plaintiffs in that case did join the United States as a defendant, the Fifth Circuit held that sovereign immunity prevented joinder of the United States, but because it was a necessary and indispensable party and the suit could therefore not go forward without it as a party, the suit was dismissed. Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957).

While this court, in initially denying the Defendants' motion seeking relief under Rule 19, relied

upon another Supreme Court case, Illinois v. City of Milwaukee, Wisconsin, 406 U.S. 91 (1972), for the proposition that a State need not be joined in a nuisance action brought by a neighboring State against cities and local commissions in that State and involving an interstate waterway, the court finds that cases such as Louisiana v. Mississippi are more closely analogous to the case *sub judice* because the partition of an interstate body of water is a necessary condition of affording the Plaintiff relief in this case. The case *sub judice* involves a proprietary or ownership interest in subsurface water. The Illinois v. City of Milwaukee, Wisconsin case did not involve a dispute over ownership of interstate water or any other property; the Louisiana v. Mississippi case, as well as other aforecited cases, did involve disputes over such ownership issues.

Turning to Rule 19(a)'s requirements, the court finds that Rule 19(a)(1) renders the State of Tennessee a necessary party because in its absence complete relief cannot be accorded among those already parties to the action. This is true because to afford the State of Mississippi the relief sought and to hold that the Defendants have misappropriated Mississippi's water from the Memphis Sands aquifer, the court must necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee, and so on, thereby effectively apportioning the aquifer. Mississippi cannot be afforded any relief otherwise. The court also notes that, while the Plaintiff contends on the one hand that only Mississippi water is involved in this suit, it also contends that the sole basis for the court's jurisdiction is the existence of a federal question because interstate water is the subject of the suit. The Plaintiff cannot

have it both ways. The court also notes that diversity jurisdiction is not possible in this case because the Plaintiff State of Mississippi brings this suit on its own behalf and it is clear that a State is not a citizen of itself and therefore cannot sue or be sued in federal court on the basis of federal diversity jurisdiction. Moor v. County of Alameda, 411 U.S. 693 (1973).

However, joinder of the State of Tennessee as a party to this suit is not possible because this court is without jurisdiction to hear such a dispute. As noted previously, original and exclusive jurisdiction of all controversies between two or more States is vested in the United States Supreme Court. See 28 U.S.C. § 1251. Thus, the court must also examine the dictates of Rule 19(b) and determine whether, in equity and good conscience, this action should proceed among the parties before it, or should be dismissed, with the State of Tennessee being thus regarded as indispensable. The court will examine Rule 19(b)'s four considerations in turn.

First, the court must consider to what extent a judgment rendered in Tennessee's absence might be prejudicial to Tennessee or to those already parties to this action. The court holds that a judgment in this matter rendered in the absence of Tennessee will be acutely prejudicial to Tennessee's interests. As the Supreme Court has noted, no single State is permitted to impose its own policy choices on neighboring States. BMW of North Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); *see* Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 149 (1934) (holding that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of [a neighboring State]."). In effect, a judgment

adverse to the Defendants in this case, prior to apportionment of the subject aquifer (which can only occur via agreement by the impacted States or by the Supreme Court), would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action. Thus, the court finds that a judgment rendered in Tennessee's absence in this case would be prejudicial to Tennessee.

Second, the court is unaware of any means by which, via protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice to Tennessee can be lessened or avoided. To afford any relief to the Plaintiff of necessity requires apportionment of the subject aquifer, thereby causing great prejudice to Tennessee.

Third and fourth, a judgment rendered in Tennessee's absence will not be adequate given the factors previously discussed by the court; however, the Plaintiff in this matter will certainly have an adequate remedy if this action is dismissed for nonjoinder. As noted above, original and exclusive jurisdiction over disputes of this type are vested in the United States Supreme Court, which has typically in the past assigned these disputes to a Special Master, who then makes proposed findings of fact and conclusions of law to the Supreme Court, which subsequently renders a decision in the case. This court's decision today in no way ends this dispute or renders the State of Mississippi without its day in court. While the Supreme Court has stated that "where possible, States [should] settle their controversies by mutual accommodation and agreement," if such a resolution is

not possible in this case, a well-established means exists for Mississippi to petition the Supreme Court for apportionment of the waters of the Memphis Sands aquifer in a suit that properly joins all necessary and indispensable parties, including the State of Tennessee. See, e.g., Louisiana v. Mississippi, 516 U.S. 22 (1995); Mississippi v. Louisiana, 506 U.S. 73 (1992); Kansas v. Colorado, 206 U.S. 46 (1907).

Given the foregoing, the court hereby finds that the State of Tennessee is a necessary and indispensable party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure. Because the joinder of Tennessee is not possible in this court, the court hereby determines that in equity and good conscience this action should be dismissed without prejudice, with the State of Tennessee being regarded by the court as indispensable.

While the court makes no formal determination in its opinion today regarding the necessity or indispensability of the State of Arkansas to this action, the court is of the opinion that Arkansas (via its current Attorney General) should be put on notice of the pendency of this action and any future action filed in the Supreme Court.

This opinion is appealable to the United States Court of Appeals for the Fifth Circuit. The court directs that all submissions to this court be included in and made a part of the record in this case.

A separate order in accordance with this bench opinion shall issue this day.

This the 4th day of February 2008.

/s/ Glen H. Davidson
Senior Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

No. 2:05CV32-D-B

[Filed September 25, 2007]

JIM HOOD, Attorney General, *ex rel.*,
THE STATE OF MISSISSIPPI, acting
for itself and *Parens Patriae* for and on
behalf of the People of the State of
Mississippi

PLAINTIFF

vs.

THE CITY OF MEMPHIS, TENNESSEE; and
MEMPHIS LIGHT, GAS & WATER DIVISION

DEFENDANTS

ORDER DENYING MOTION FOR
JUDGMENT ON THE PLEADINGS
AND DENYING MOTIONS
FOR PARTIAL SUMMARY JUDGMENT

Presently before the court is the Defendants' motion for judgment on the pleadings and three separate motions for partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest. Upon due consideration, the court finds that the motions should be denied.

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants' alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer, which belongs to the State of Mississippi. The Defendants have now filed the pending motions, one for judgment on the pleadings and three separate motions for partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest. The Plaintiff opposes the motions.

Rule 12(c) provides that any party may move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. Fed. R. Civ. P. (12)(c). Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noted facts." Herbert Abstract Co. v. Touchstone Props., Ltd., 914 F.2d 74, 76 (5th Cir. 2001). The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 420 (5th Cir. 2001). The standard for a motion to dismiss under Rule 12(c) is the same as for a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 313 (5th Cir. 2002); Jones v. Greninger, 188 F.3d 322, 324 (5th Cir.

1999). Thus, the court must accept all factual allegations in the complaint as true and take them in the light most favorable to the Plaintiff. Erickson v. Pardus, --- U.S. ----, 127 S.Ct 2197, 2200 (2007); Christopher v. Harbury, 536 U.S. 403, 406 (2002). A complaint must simply contain a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S.Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint does not need detailed factual allegations, but a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not suffice. Id. at 1965 (citations omitted); Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000). The factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations in the complaint are true (even if doubtful in fact). Bell Atl. Corp., 127 S.Ct. at 1965.

As noted above, in ruling on a Rule 12(c) motion, the court will accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. Jones, 188 F.3d at 324 (5th Cir. 1999). In deciding whether to grant a 12(c) motion, the issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Jones, 188 F.3d at 324. Judgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain. Fed. R. Civ. P. 12(c); Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 891 (5th Cir. 1998).

Given the stringent standard noted above, the court finds in this case that the Defendants' motion for judgment on the pleadings should be denied. As the court noted in previous orders denying motions to dismiss filed by the Defendants, a plethora of material facts are in dispute in this case and judgment on the pleadings is simply not appropriate. Accordingly, the Defendants' present motion for judgment on the pleadings is denied.

As for the Defendants' motions for partial summary judgment, the court finds that genuine issues of material fact exist at the present juncture which preclude the entry of partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest. Further, the court has the discretion, which it exercises here, to allow the subject claims to proceed to trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986) ("Neither do we suggest ... that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.").

THEREFORE, it is hereby ORDERED that the Defendants' motion for judgment on the pleadings and three separate motions for partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest (docket entries 186, 224, 226, and 232) are DENIED.

SO ORDERED, this the 24th day of September 2007.

/s/ Glen H. Davidson
Senior Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

No. 2:05CV32-D-B

[Filed September 13, 2005]

JIM HOOD, Attorney General, *ex rel.*, THE STATE OF MISSISSIPPI, acting for itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi

PLAINTIFF

vs.

THE CITY OF MEMPHIS, TENNESSEE; and MEMPHIS LIGHT, GAS & WATER DIVISION

DEFENDANTS

ORDER DENYING MOTION TO ALTER OR AMEND

Presently before the court is the Defendants' motion to alter or amend the court's August 8, 2005, order denying the Defendants' motion to dismiss. Upon due consideration, the court finds that the motion,

which is in essence a motion to reconsider, should be denied.[1]

On February 1, 2005, the Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants' alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer, which belongs to the State of Mississippi. Thereafter, the Defendants filed a motion to dismiss, which the court denied on August 8, 2005. In the present motion, filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Defendants seek to have the court reconsider its decision, and alter or amend its August 8, 2005, order.

Rule 60 of the Federal Rules of Civil Procedure allows relief from a judgment or order for various reasons, including clerical errors, newly discovered evidence, fraud, or "any other reason justifying relief from the operation of the [order]." Fed. R. Civ. P. 60(b). Here, the Defendants have requested relief solely on the basis that they disagree with the court's prior ruling, and they insist that they are in fact entitled to a dismissal of the Plaintiff's claims.

It was only after careful consideration of the parties' submissions that the court entered its order

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[1] The Defendants also request that the court certify the issues presented in this motion for interlocutory appeal, pursuant to 28 U.S.C. §1292(b). The court finds, however, that these issues do not involve any controlling questions of law as to which there is substantial ground for difference of opinion. As such, the court finds that its denial of the Defendants' motion to dismiss does not present issues of sufficient magnitude so as to warrant an interlocutory appeal.

denying the Defendants' motion to dismiss. In the present motion to alter or amend, the Defendants do not assert any new arguments, facts or case law that would give the court any reason to modify its prior ruling in any respect. As such, the court is satisfied that its prior ruling is not in error, and the court declines to alter or amend that ruling.

THEREFORE, it is hereby ORDERED that the Defendants' motion to alter or amend (docket entry 48) is DENIED.

SO ORDERED, this the 12th day of September 2005.

/s/ Glen H. Davidson
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

No. 2:05CV32-D-B

[Filed August 9, 2005]

JIM HOOD, Attorney General, ex rel., THE STATE OF MISSISSIPPI	)
PLAINTIFF	)
VS.	)
THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION	)
DEFENDANTS	)

ORDER DENYING MOTION TO DISMISS

Presently before the Court is the Defendants' motion to dismiss. Upon due consideration, the Court finds that the motion should be denied.

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to

the Defendants' alleged wrongful appropriation of ground water from the Memphis Sands Aquifer which belongs to the State of Mississippi. The Defendants challenge the complaint on a variety of legal grounds none of which the Court finds persuasive. The Court has carefully reviewed the parties comprehensive briefs and finds that the Plaintiff does have standing and the claims are ripe, the State of Tennessee is not an indispensable party, this Court does have subject matter jurisdiction and venue is proper. Thus, the Defendants' motion to dismiss shall be denied in all respects.

THEREFORE, it is hereby ORDERED that the Defendants' motion to dismiss (docket entry 21 shall be DENIED.

SO ORDERED, this the 8th day of August 2005.

/s/ Glen H. Davidson
Chief Judge

APPENDIX F

CONSTITUTION OF THE UNITED STATES OF AMERICA ARTICLE III. JUDICIAL POWER

U.S. Const. Art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be

held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

UNITED STATES CODE
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

28 U.S.C.§ 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

MISSISSIPPI CODE of 1972 ANNOTATED
TITLE 51. WATERS, WATER RESOURCES, WATER DISTRICTS, DRAINAGE, AND FLOOD CONTROL
CHAPTER 3. WATER RESOURCES; REGULATION AND CONTROL
ARTICLE 1. GENERAL PROVISIONS

Miss. Code Ann. § 51-3-1. Declaration of policy on conservation of water resources

It is hereby declared that the general welfare of the people of the State of Mississippi requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, that the waste or unreasonable use, or unreasonable method of use, of water be prevented, that the conservation of such water be exercised with the view to the reasonable and beneficial use thereof in the interest of the people, and that the public and private funds for the promotion and expansion of the beneficial use of water resources shall be invested to the end that the best interests and welfare of the people are served.

It is the policy of the Legislature that conjunctive use of groundwater and surface water shall be encouraged for the reasonable and beneficial use of all water resources of the state. The policies, regulations and public laws of the State of Mississippi shall be interpreted and administered so that, to the fullest extent possible, the ground and surface water resources within the state shall be integrated in their use, storage, allocation and management.

All water, whether occurring on the surface of the ground or underneath the surface of the ground, is

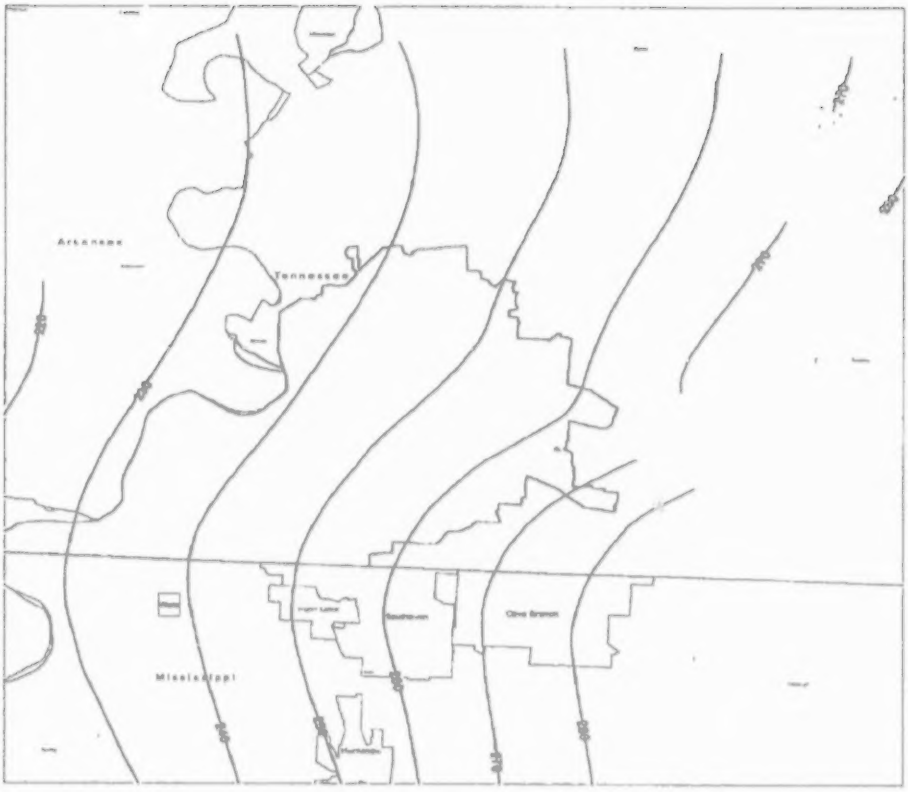
hereby declared to be among the basic resources of this state to therefore belong to the people of this state and is subject to regulation in accordance with the provisions of this chapter. The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi.

APPENDIX G

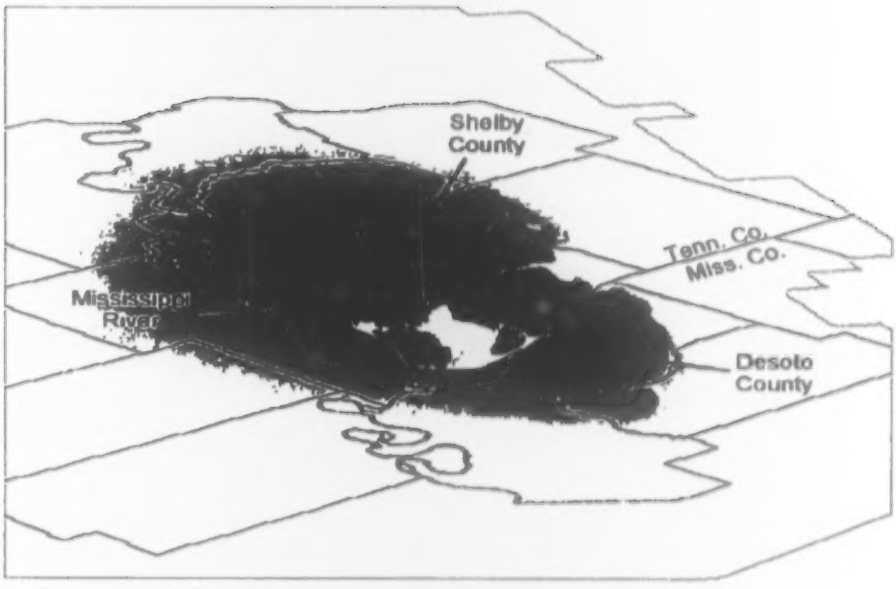
[SEE THE FOLLOWING PAGES]

Explanatory Note: The figure to the right is a ground water flow model-computed potentiometric surface of the Memphis Sand or Sparta Aquifer prior to 1886, which is considered to represent pre-development or pre-pumping conditions. It shows that the pre-development ground water flow direction of the Aquifer was from east to west toward the Mississippi River. Potentiometric surface is the ground water level to which water in an aquifer will rise in a tightly cased water well. Potentiometric surface maps illustrate the ground water gradient across a given area. Potentiometric surface maps also provide information regarding ground-water gradient or flow direction which is always perpendicular to contours. In the figure, it is clear that there is no cone of depression under pre-development conditions. The ground water in the aquifer underlying northern Mississippi moved from east to west as may be demonstrated by flow lines drawn perpendicular to the depicted contours on the potentiometric surface map. None of the ground water involved in Mississippi's action would have ever naturally flowed into Tennessee.

45a


Arkansas
Tennessee
Mississippi
Alabama
Georgia
Louisiana
Florida
Atlantic Ocean
Gulf of Mexico

Explanatory Note: Commencing in 1886, MLGW's pumpage and withdrawal of aquifer groundwater disturbed its steady-state condition and created a dynamic flow condition, thus altering the aquifer ground-water system. These circumstances created the cone of depression under Memphis that expands deeply into Mississippi. A three-dimensional illustration of the cone would resemble the image shown to the right. In the pre-development steady-state condition of the aquifer, there was continual inflow (recharge) of water in the aquifer so that there was always a constant volume of water physically present under Mississippi, and more particularly Desoto County. The water levels of this constant volume have varied over time depending on stresses on the aquifer such as MLGW's pumping. There are a number of components that make up the aquifer water inventory or "budget"as it is defined in hydrogeological terms. These include recharge, changes in storage, ground-water in-flow and out-flow, and other factors. When a stress such as MLGW's pumpage is introduced to the system, it creates a cone of depression that gradually reaches out further and further to draw in more water to maintain the ground-water supply for MLGW's wells. The ground-water system in the Desoto County area was, prior to MLGW pumpage, in a steady-state condition.

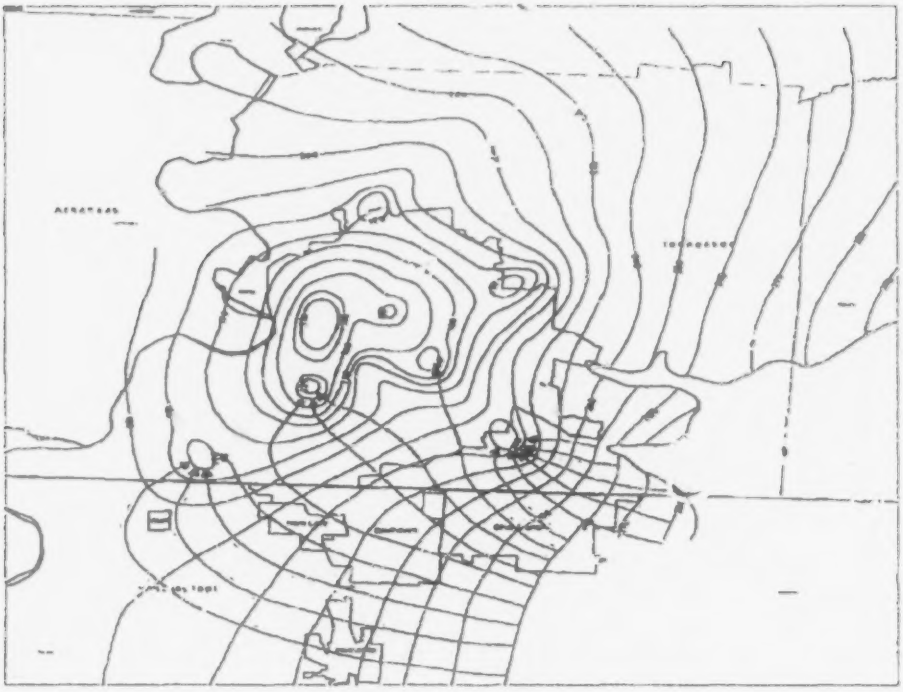

Shelby
County
Tenn. Co.
Miss. Co.
Mississippi
River
Desoto
County

Explanatory Note: A cone of depression is a pattern that forms when a pumping well pumps from an aquifer, in this case a confined aquifer. When a large cone forms in a confined aquifer, the water levels decline due to pumping and there is an increase in hydraulic gradient which in turn alters and controls ground water velocity and direction of flow. The shape and extent or size of the cone depends on the rate and duration of pumping, and the hydraulic properties of the aquifer (groundwater system). It begins to form a funnel-shaped vortex in the potentiometric surface of the aquifer, as shown (for illustration purposes only) in the hydrogeologic cross-section to the right.

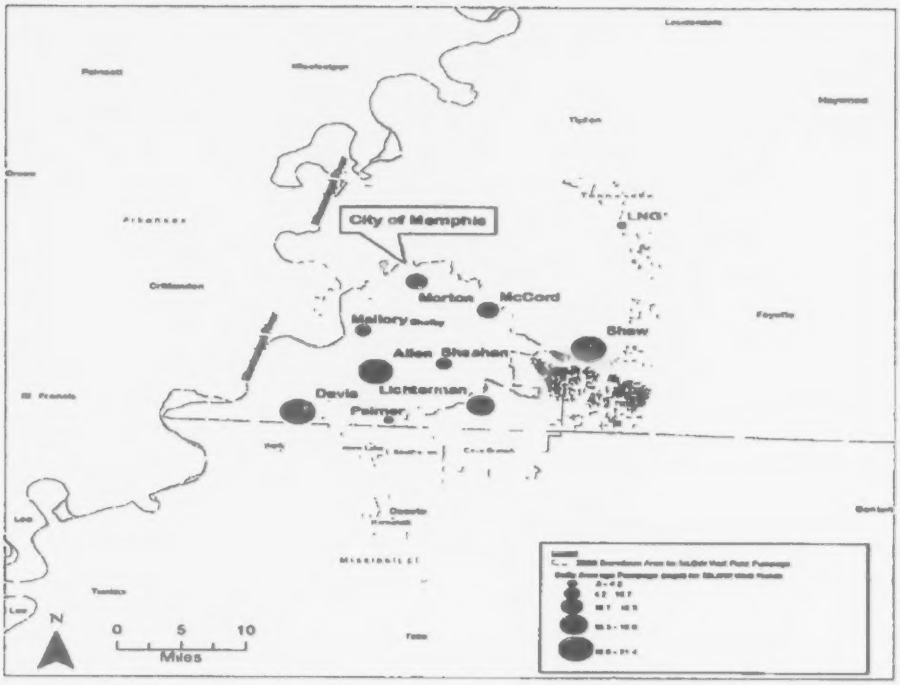
BEST AVAILABLE COPY

Explanatory Note: MLGW's pumping operations have diverted the aquifer's ground water movement from its natural westerly direction to a true northward accelerated flow path toward the steepest part of the cone which underlies Memphis. As a result, MLGW's pumpage has been and is now capturing aquifer ground water beneath Mississippi. The illustration to the right demonstrates how MLGW's ground water pumpage has altered the natural flow gradient and rate, causing Mississippi's water to move northward. The curved lines on the illustration, called "potentiometric contours," depict the configuration and expansive geographic scope of the cone. The illustration is a "flow net," a graphical representation of the ground-water flow system consisting of a set of equipotential lines (i.e., the contour lines of the aquifer's potentiometric surface as defined by measured water levels) and corresponding flow lines. Flow net analysis is a standard hydrologic method used to calculate ground-water flow volumes, in this instance driven by the cone from within Mississippi northward into Memphis. Flow lines define the direction of ground-water movement resulting from the pumping stress imposed by MLGW on the aquifer beneath Mississippi. The red arrows, or "flow lines" on the flow net illustration to the right show how the cone causes Mississippi's aquifer ground water to actually change direction from its normal east to west course of movement as it is drawn into a true north pathway directly into the smaller contours representing MLGW's southernmost well fields.

51a



Explanatory Note: Memphis and MLGW have never disputed either the existence of the huge cone caused by their pumping or its past and continuing effects on Mississippi's ground water resources. The cone results from cumulative ground water pumping from multiple wells in numerous well fields operated by MLGW for Memphis' municipal supply and sales. Essentially, many smaller individual well cones of depression overlap forming one, expansive cone of depression with broad geographical impact. The area of this large cone, occurring from MLGW's cumulative well field pumpage, is depicted in yellow on the graphic representation shown to the right. Due to demand and growth of MLGW's system, the aquifer has been pumped and drawn down at a higher rate than it is being recharged or replenished, causing water levels to drop and creating the cone of depression expanding outward from Memphis across the border into Desoto County, Mississippi.


City of Memphis
LNG
Morton
McCord
Mallory
Shaw
Allen
Shushan
Davis
Lichterman
Palmer
N
0 5 10
Miles

APPENDIX H

Examples of Decisional Law, Legislative Enactments and Constitutional Provisions of Various States Declaring State-Ownership and Control of Water Resources as a Function of Statehood and Inherent Sovereignty and Examples of Federal and State Studies Confirming the Diversion of Mississippi's Ground Water by Memphis-MLGW

A. Examples of Reported Decisions Confirming "State-Ownership" of Water Resources

- *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (affirming *Cinque Bambini Partnership v. State of Mississippi*, 491 So.2d 508, 511-14, 516-17 & 519-20 (1986) (effective upon statehood, on March 1, 1817, the United States granted to Mississippi in trust all water and other resources within the State's territorial boundaries);

- *National Audubon Society v. The Superior Court of Alpine County*, 658 P.2d 709, 724, 727-28 (Calif. 1983) (all water within state is property of people of the state; state, as sovereign, retains control of waters)

- *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners,* 956 P.2d 1260 (Colo. 1998) (all surface and ground water is a public resource)

- *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935) (waters of

the public domain are *publici juris*, subject to plenary control of the states);

- *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 123 P.831 (Colo. App. 1912) (ultimate title or ownership of water of state is vested in public);

- *Bennett v. Twin Falls North Side Land and Water Co.*, 150 P. 336, 338-39 (Idaho 1915) (ownership of the corpus of the water is in the state);

- *State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940) (State is the owner of water within its borders and incident to this ownership is right and duty to protect and conserve it under State's police powers connected with its ownership of water in trust for the people);

- *State, ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) (State has power, as trustee, to bring trespass action to recover value of subterranean resources removed from river bed);

- *Ex parte Louis Fritz*, 86 Miss. 210, 38 So. 722, 723 (1905) (ownership of *ferae naturae* is in the state in its sovereign capacity; state has right and duty to preserve and protect public resources from trespassers);

- *Barry v. Merickel Holding Corp.*, 108 P.2d 311, 314-15 (Nev. 1940) (all water of state, whether above or beneath the surface of the ground, belongs to state; water being state property, the state has the right and power to prescribe how it may be used);

- *Johns-Manville Sales Corp. v. New Jersey Water Supply Auth.*, 211 N.J. Super. 315, 511 A.2d 1194, 1195-97 (1986) (water resources are public assets held by state; ultimate ownership of state of precious natural resources is held by state for public's use);

- *New Mexico v. City of Las Vegas*, 89 P.3d 47, 61 (N.M. 2004) (all water within state belongs to state);

- *State v. Erickson*, 308 P.2d 983 (N.M. 1957) (all water within the state, whether above or beneath the surface of the ground, belongs to the state; the state as owner has right to prescribe how water may be used);

- *State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945) (water held to belong to public);

- *United Plainsmen Ass'n v. North Dakota State Water Conserv. Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976) (all streams and natural water courses shall forever remain property of state; all water within limits of state held by state by virtue of its sovereignty);

- *Parks v. Cooper*, 676 N.W.2d 823, 838 (S.D. 2008) ("we align ourselves with the Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah and Wyoming decisions that have recognized the public trust doctrine's applicability to state waters").

- *Murphy v. Kerr*, 296 F.536 (D.N.M. 1923) (Court noted that Arizona, Colorado, California, Montana, Nevada, New Mexico, Oklahoma, Oregon, North Dakota, South Dakota, Texas, Utah, Wyoming and Idaho have declared that "all waters within the state are the property of the public, and belong to the state").

B. Examples of Legislative Enactments Declaring "State-Ownership" of Water Resources

- Alabama's "Water Resources Act," ALA. CODE ANN. §9-10B-1 (all waters of the state, above or below surface of ground, are the resources of state);

- Arizona's "Groundwater Management Act," ARIZONA STAT. §45-401 (groundwater of state made subject to state management and regulation);

- Arkansas' "Ground-water Protection and Management Act" §15-22-302 (mandate for reporting use of ground water to state);

- Delaware's "Natural Resources-Environment Control" Law, DEL. CODE ANN. Tit. 7, §6001 (the state, in the exercise of its sovereign power, controls development and use of land and water resources of state);

- Florida's "Water Resources Act," FLA. STAT. ANN. §373.016 (waters of state are its basic resources controlled by state for benefit and use of public);

- Georgia's "Ground-Water Use Act," GA. CODE ANN. §12-5-91 (the water resources of the state are to be regulated in public interest);

- Indiana's "Waters Rights; Ground Water" Law, IND. CODE ANN. §14-25-3-4 (ground water resources of state protected and regulated for citizens' beneficial use);

- Iowa's "Resources Enhancement and Protection" Law, IOWA CODE ANN. §455A.16 (state's natural resources subject to state protection);

- Kentucky's "Geology and Water Resources" Law, KY. REV. STAT. ANN. §151.120 (water occurring in any stream, lake, ground water, or subterranean water in Commonwealth is declared to be a natural resource and public water of the Commonwealth subject to control and regulation for the public);

- Minnesota's "Water Policy," MINN. STAT. ANN. §103A.201 (public waters are subject to control of the state);

- Mississippi's "Omnibus Water Rights Act," MISS. CODE ANN. §51-3-1 (all water, whether occurring on the surface of the ground or beneath it, is among the basic resources of Mississippi; the State, in the exercise of its police powers (derived from the public trust), has control of development, management and use of water in the State);

- New Jersey's "Waters and Water Supply Management" statutes, N.J. STAT. ANN. §58:1A-2 (water resources of state are public assets of state held in trust for people);

- New York's "Water Resources Law," N.Y. ENVTL. CONSERV. LAW §15-0103 (sovereign power to regulate and control water resources of state "ever

since its establishment has been and now is vested exclusively in the state");

- South Carolina's "Groundwater Use and Reporting Act," S.C. CODE ANN. §49-5-20 (groundwater resources of the state subject to regulation to protect resources and maintain conditions for use by public);

- Tennessee's "Water Quality Control Act," TENN CODE ANN. §69-3-102 (the waters of Tennessee are the property of the state and are held in the public trust for the use of the people of the state);

- Virginia's "Water Policy" Law, VA. CODE ANN. §62.1-11 (state's waters are natural resource regulated, controlled and protected by Commonwealth in exercise of its police powers).

C. Examples of Eastern States Adopting Regulated Riparianism Predicated on State Ownership of Water Resources

- States that have active regulated riparian systems and the approximate date of that adoption are as follows: Alabama (1993); Arkansas (1957); Connecticut (1982); Delaware (1959); Florida (1972); Georgia (1977); Hawaii (1987); Iowa (1957); Kentucky (1966); Maryland (1957); Massachusetts (1985); Minnesota (1973); **Mississippi (1985)**; New Jersey (1965); North Carolina (1973); New York (1979); Virginia (1989); and Wisconsin (1957). *Compare* MISS. CODE ANN. §51-3-1 (1985 & Supp. 2006) *with* ALA. CODE §9-10B-2; CONN. GEN. STAT. ANN. §22a-366; DEL. CODE ANN. TIT. 7, §6001; FLA. STAT. ANN. §373.016; GA. CODE ANN. §§12-5-21, 12-

5-91; HAW. REV. STAT. §174C-2(A); IND. CODE ANN. §13-12-1-8; IOWA CODE ANN. §455B.262(3); KY. REV. STAT. ANN. §151.110; MD. CODE ANN. NAT. RES. §8-801(1); MINN. STAT. ANN. §105.38; N.J. STAT. ANN. §58:1A-2; N.Y. ENVTL. CONSERV. LAW §§15-0103, 15-0105(1); N.C. GEN. STAT. §143-215.12; VA. CODE ANN. §62.1-11; VA. CODE ANN. §62.1-44.36, 62.1-44.84; and WIS. STAT. ANN. §144.25(1). *See also* American Society of Civil Engineers, "Regulated Riparian Model Water Code," Section 1-R-1-01 at 1 (2004) ("the waters of the State are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate and control the withdrawal and use of those waters").

D. Examples of State Constitutional Provisions and Other Statutes Confirming State-Ownership of Water Resources

- Wyoming Constitution, Article 8, Section 1 (declares that "the water of all natural streams, springs, lakes or collection of still water within the boundaries of the state are . . . the property of the state.");

- Colorado Constitution, Article XVI, Section 5 (declares that "the water of every natural stream, not heretofore appropriated, within the State of Colorado, is declared to the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriate as hereinafter provided.");

- Montana Constitution, Article IX (declares that all water within the state, including underground

water, is the property of the state, and that all its use is a "public use" notwithstanding its user or purpose.);

- New Mexico Constitution, Article XVI, Sections 1, 2 (declares that all the "water of every natural stream, perennial or torrential, within the state" unappropriated at the time of statehood, "belong(s) to the public.");

- California Constitution, Article 10, Section 5 (provides that "the use of all water" by appropriation is a "public use" and subject to the regulation and control of the state.");

- Nevada Revised Statutes, 533.125 (provides that "the water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public");

- North Dakota Century Code, §61-01-01 (declares both surface and ground water to "belong to the public");

- Utah Code, §73-1-1 (declares that all waters in the state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof");

- Oregon Revised Statutes 537.110 (provides that all waters of the state, whether above or below the ground, are the property of the public);

- Nebraska Revised Statutes §46-202(1) (provides that the water of every natural stream not heretofore appropriated within the State of

Nebraska, including the Missouri River, is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation);

- Washington's Legislation set forth in RCW §90.03.010 (provides that all waters within the state belong to the public);

- Idaho Code §42-101 (declares that all its water resources belong to the state);

- California Water Code, Section 1201 (provides that surface waters are "public waters of the state");

- Texas Water Code §11.021 (declares that surface water is the "property of the state").

E. Scientific Reports. Studies and reports prepared by the United States Geological Survey ("USGS") during the 1960's, 1970's, 1980's, 1990's, and in this decade, and the University of Memphis Ground Water Institute ("GWI") during the 1990's and currently, with funding from and in cooperation with MLGW and Memphis, have confirmed the existence of the cone of depression and the fact that it extends into, diverts and captures ground water from beneath Mississippi. These scientific reports include:

- Gerald K. Moore, *Geology and Hydrology of the Claiborne Group in Western Tennessee*: U.S. Geological Survey Water-Supply Paper 1809-F (1965) (Moore reported that, under conditions of heavy pumping in Memphis, 25 million gallons per day of aquifer ground water were being diverted

from Mississippi into Shelby County as early as 1960);

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- James Kingsbury, *Altitude of the Potentiometric Surface, September 1990, and Historical Water-Level Changes in the Memphis Aquifer in the Memphis Area, Tennessee* (1990) (map depicts cone of depression as extending across the Shelby County-Desoto County border into Mississippi);

- W. S. Parks & J. K. Carmichael, *Altitude of Potentiometric Surface, Fall 1985, and Historic Water-Level Changes in the Memphis Aquifer in Western Tennessee,* U.S. Geological Survey Water-Resources Investigations Report 88-4180 (1990a) (Parks and Carmichael found significant declines in the water levels in the aquifer for the period 1928-1983);

- J. Kerry Arthur & R. E. Taylor, *Definition of the Geohydrologic Framework and Preliminary Simulation of Ground-Water Flow in the Mississippi Embayment Aquifer System, Gulf Coastal Plain, United States*: U.S. Geological Survey Water-Resources Investigation Report 86-4364 (1990) (regional ground water model demonstrated the change in the natural east to west aquifer flow path and gradient to a northern direction into the cone of depression created by pumpage in Memphis; Arthur concluded that, as of 1980, approximately 30% of MLGW's water supply was being derived from the ground water system beneath Mississippi);

- J. Outlaw, *A Ground Water Flow Analysis of the Memphis Sand Aquifer in the Memphis, Tennessee, Area,* University of Memphis Ground-Water Institute (1994) (GWI concluded that the majority of the water withdrawn by the municipal well fields in Shelby County originates in the eastern part of Shelby County, Fayette County, Tennessee, and Desoto and Marshall Counties, Mississippi, as a result of the regional cone of depression extending into northwest Mississippi).

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(2)

No. 09-289

In The
Supreme Court of the United States

THE STATE OF MISSISSIPPI,
Petitioner,

v.

THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the State of Tennessee is a necessary and indispensable party to a lawsuit filed by the State of Mississippi against the City of Memphis, Tennessee, and its utility division in which Mississippi seeks money damages for the alleged "wrongful taking" of ground water it claims to "own" when (1) the ground water at issue is part of an interstate aquifer underlying multiple states, including Tennessee and Mississippi; (2) the aquifer has never been apportioned either by this Court, congressional act, or interstate compact; and (3) the City of Memphis withdraws water from the aquifer only from within Tennessee's boundaries and in compliance with Tennessee's laws.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities v

Introduction 1

Opinions Below 3

Statement of the Case 4

1. Factual Background 4

2. Rule 15(2) Misstatements of Fact in Mississippi's Petition 5

3. Procedural History 8

Reasons for Denying the Petition for Writ of Certiorari 11

I. The Decision Below Is Consistent With This Court's Well Settled Equitable Apportionment Decisions. 13

A. Under this Court's equitable apportionment decisions, Tennessee is a necessary and indispensable party 13

B. Mississippi's claim to "own" a specific quantity of ground water in the Aquifer based solely on its state boundary has been consistently rejected by this Court. 16

C. Mississippi's attempt to create an exception to the doctrine of equitable apportionment for underground interstate water resources is illogical and contrary to this Court's decisions 18

II. The Decision Below Does Not Conflict With This Court's Decisions Regarding State Sovereignty 21

III. The Decision Below Does Not Conflict With Courts' Interpretations of 28 U.S.C. § 1251(a) 24

A. There is no conflict with *Illinois v. Milwaukee* 24

B. There is no conflict with rulings from the Eighth and Eleventh Circuits involving the U.S. Army Corps of Engineers 26

IV. The Decision Below Does Not Raise an Important or Unsettled Question Regarding Rule 19 28

Conclusion 30

Appendix:

Appendix 1: Excerpts from deposition of David A. Wiley (Nov. 15, 2007) 1b

Appendix 2: Excerpts from deposition of Jamie Crawford (July 30, 2007) 7b

Appendix 3: Excerpts from deposition of Jim Hoffman (July 30, 2007) 14b

Appendix 4: Excerpts from deposition of Charles Thomas Branch (Oct. 1, 2007) 17b

Appendix 5: Excerpt from Oral Argument Regarding Jurisdiction (Feb. 4, 2008) 20b

Appendix 6: Excerpts from Amicus Curiae Brief of the State of Tennessee in Support of the City of Memphis, Tennessee, and Memphis Light Gas and Water Division and Requesting Affirmance of the District Court 22b

TABLE OF AUTHORITIES

Cases

Alabama v. U.S. Army Corps of Eng'rs, 382 F. Supp. 2d 1301 (N.D. Ala. 2005) 13

Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117 (11th Cir. 2005) 26, 27

Arizona v. California, 373 U.S. 546 (1963) 14, 16, 24

Cinque Bambini P'ship v. State, 491 So. 2d 508 (Miss. 1986) 21

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 24

Colorado v. New Mexico, 459 U.S. 176 (1982) 2, 13, 14, 17

Connecticut v. Massachusetts, 282 U.S. 660 (1931) 14, 22

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242 (11th Cir. 2002) 26, 27

Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 2, 13, 15, 17, 18, 30

Hood, ex rel. Mississippi v. City of Memphis, Tenn., 533 F. Supp. 2d 646 (N.D. Miss. 2008) 3

Hood, ex rel. Mississippi v. City of Memphis, Tenn.,
570 F.3d 625 (5th Cir. 2009) 3

Howard v. Ingersoll, 54 U.S. 381 (1851) 21, 22

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 21

Idaho v. Oregon, 462 U.S. 1017 (1983) 17, 20

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) 3, 24, 25, 26

Ill. Cent. R.R. Co. v. Illinois,
146 U.S. 387 (1892) 21

Kansas v. Colorado,
206 U.S. 46 (1907) 2, 14, 20, 22, 23, 24

Martin v. Waddell's Lessee, 41 U.S. 367 (1842) .. 21

Montana v. United States, 450 U.S. 544 (1981) .. 21

Nebraska v. Wyoming, 325 U.S. 589 (1945) .. 14, 24

Nebraska v. Wyoming, 515 U.S. 1 (1995) 19

New Jersey v. New York,
283 U.S. 336 (1931) 14, 17, 25, 30

New Jersey v. New York,
345 U.S. 369 (1953) 25

*Oregon ex rel. State Land Bd. v. Corvallis Sand &
Gravel Co.*, 429 U.S. 363 (1977) 21

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988) 21

Pollard v. Hagan, 44 U.S. 212 (1845) 21

South Dakota v. Ubbelohde,
330 F.3d 1014 (8th Cir. 2003) 26, 27

Texas v. New Mexico, 462 U.S. 554 (1983) . 2, 15, 19

Washington v. Oregon, 297 U.S. 517 (1936) .. 14, 19

Wisconsin v. Illinois, 449 U.S. 48 (1980) 19

Wyoming v. Colorado,
259 U.S. 419 (1922) 15, 17, 22, 26

Statutes

28 U.S.C. § 1251(a) ..... passim
TENN. CODE ANN. § 68-221-706(a)(5) 5
TENN. CODE ANN. § 69-7-304(1) 4

Rules

Sup. Ct. R. 10(a) 11
Sup. Ct. R. 10(c) 11
Sup. Ct. R. 15(2) 5, 16
Fed R. Civ. P. 19 ..... passim
Fed R. Civ. P. 19(a)(1) 28
Fed R. Civ. P. 19(b) 28

Other

4 WATERS & WATER RIGHTS
(Robert E. Beck ed., 1991 ed., 2004 repl. vol.) . . . 20

DAN A. TARLOCK, LAW OF WATER RIGHTS &
RESOURCES (2009) 19

INTRODUCTION

The State of Mississippi has sued the City of Memphis, Tennessee ("Memphis") and its utility division, Memphis Light, Gas & Water Division ("MLGW"),[1] for the alleged wrongful taking of ground water from an interstate aquifer that lies beneath and is shared by Tennessee, Mississippi, and other states. Mississippi claims to "own" the specific quantity of ground water at issue in this case.

Memphis withdraws ground water from the interstate aquifer through wells that are located entirely within Tennessee and operated in compliance with Tennessee law. The ground water in the aquifer has never been apportioned among the states overlying it by interstate compact, equitable apportionment, or act of Congress.

Consistent with the undisputed facts and well-settled law, the district court and the Fifth Circuit concluded that: (1) Mississippi's claims against Memphis and MLGW necessarily assert "ownership" over a portion of the interstate resource that Mississippi shares with Tennessee; (2) equitable apportionment is the doctrine of federal common law that governs adjudication of states' sovereign rights to the use of interstate water resources; (3) the equitable apportionment of an interstate water resource is a matter "between states," and, therefore, Tennessee must be a party to any such action concerning the aquifer at issue; and (4) this Court has original and

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[1] Respondents are sometimes referred to herein collectively as "Memphis."

exclusive jurisdiction to hear disputes between states pursuant to 28 U.S.C. § 1251(a).

The district court correctly held that Mississippi's lawsuit must be dismissed because Tennessee is a necessary and indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure. The Fifth Circuit properly upheld the district court's decision, finding no abuse of discretion.

Mississippi's request for review fails on multiple grounds. *First*, the ruling below is entirely consistent with and, in fact, required by this Court's decisions holding that equitable apportionment is the doctrine that governs disputes between states over rights to interstate water resources. *See, e.g.*, *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). It is well settled that equitable apportionment requires the presence of the affected states and that this Court has exclusive jurisdiction over such actions. *Id.*; *see also Texas v. New Mexico*, 462 U.S. 554, 567 (1983); *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938). Mississippi's attempt to carve out an exception for interstate ground water finds no support in this Court's equitable apportionment decisions.

Second, Mississippi's claim that the decision below conflicts with this Court's cases involving the equal footing and public trust doctrines is completely unfounded. To the contrary, the doctrine of equitable apportionment is consistent with and in fact stems from the same principle of state sovereignty underlying this Court's equal footing and public trust decisions – that of equality of right among the states. *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).

Third, there is no conflict in the circuits that warrants certiorari. Mississippi asserts that the decision below conflicts with decisions of the Eighth and Eleventh Circuits involving interstate water rights. Yet those cases involve factually distinct claims against the U.S. Army Corps of Engineers, in which the pertinent legal issue was the Corps' statutory authority to operate dams and reservoirs. Similarly, Mississippi's claim that the Fifth Circuit's decision conflicts with this Court's interpretation of 28 U.S.C. § 1251(a) in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), relies on a deeply flawed understanding of that case.

Finally, the decision below does not raise an important or unsettled question regarding Rule 19 of the Federal Rules of Civil Procedure. The Fifth Circuit made a highly fact-intensive and practical determination that Mississippi's lawsuit necessarily impacts Tennessee's rights to the shared use of the Aquifer and that a judgment rendered in its absence would be acutely prejudicial to Tennessee's interests. The Fifth Circuit affirmed the district court's Rule 19 analysis based on an abuse of discretion standard. Mississippi's Petition fails to present any important federal questions that warrant this Court's review.

OPINIONS BELOW

The district court's dismissal of Mississippi's lawsuit is reported at *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008). The Fifth Circuit's ruling affirming the district court's decision is reported at *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009). Both opinions are reproduced in the Appendix

of Mississippi's Petition and will be cited herein as "*Dist. Ct.* (Petition, p. _a)" and "*Fifth Cir.* (Petition, p. _a)."

STATEMENT OF THE CASE

1. Factual Background

This case concerns Mississippi's claim that it "owns" a specific portion of ground water flowing through the Memphis Sand Aquifer, an interstate water resource underlying and shared by several states, including Tennessee and Mississippi (the "Aquifer").

Mississippi does not allege any impairment to its rights to use the Aquifer. Instead, Mississippi asserts common law tort claims – conversion and trespass – against Memphis and its utility division, MLGW, alleging that Respondents have wrongfully withdrawn ground water that is "owned" by Mississippi. Mississippi seeks monetary damages in excess of $1 billion.

For the past 120 years, Memphis has relied on the Aquifer as its primary public water source. It is undisputed that Memphis withdraws ground water from the Aquifer through wells that are located entirely within the borders of Tennessee and that Memphis operates those wells in compliance with Tennessee's laws and regulations.[2] It is further

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[2] *See, e.g.*, TENN. CODE ANN. § 69-7-304(1) (requiring the registration of water withdrawals of more than 10,000 gallons per day with the Tennessee Department of Environment and

undisputed that the Aquifer has never been apportioned by judicial decree, interstate compact, or congressional act. *Fifth Cir.* (Petition, p. 2a) (affirming that "no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas"); *Dist. Ct.* (Petition, p. 23a) (finding that the Aquifer had "not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court").

2. Rule 15(2) Misstatements of Fact in Mississippi's Petition

Mississippi makes several erroneous factual assertions about the Aquifer and the ground water moving through it. Pursuant to Rule 15(2) of the Supreme Court Rules, Respondents bring those factual misrepresentations to the Court's attention.

First, Mississippi describes the ground water in the Aquifer beneath DeSoto County, Mississippi, as "essentially static" and "naturally entrapped" beneath and within Mississippi's state borders. Petition, pp. 3-4. This description is false and is refuted by the testimony of Mississippi's own retained expert and officials at the Mississippi Department of Environmental Quality ("MDEQ"), all of whom confirm that the ground water in the Aquifer is, and prior to any pumping from the Aquifer was, dynamic, moving,

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Conservation ("TDEC")); TENN. CODE ANN. § 68-221-706(a)(5) ("The source of raw water and the quantity of raw water to be drawn from the waters of the state are subject to review and approval by [TDEC]."); *see also Fifth Cir.* (Petition, p. 14a) (stating that Memphis is utilizing the Aquifer "pursuant to Tennessee law").

and flowing through and out from under Mississippi and never confined there. App. 1, pp. 2b-4b, 6b;[3] App. 2, p. 12b;[4] App. 3, pp. 15b-16b;[5] App. 4, pp. 18b-19b.[6]

According to testimony from Mississippi's own witnesses, ground water in the Aquifer is continually flowing in and out of Mississippi; it does not remain there. App. 1, pp. 2b-4b, 6b; App. 3, pp. 15b-16b. In fact, Mississippi's retained expert concedes that, before any pumping began, ground water naturally moved through the Aquifer from Mississippi into Tennessee. App. 1, pp. 2b-4b, 6b.

Second, Mississippi suggests in its Petition (for the first time in this litigation) that the Aquifer is not a shared interstate resource, but rather two "finite, confined reserve[s] of ground water" – one in Mississippi and one in Tennessee. Petition, p. 4; *see*

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[3] Appendix 1 includes excerpts from the transcript of the deposition of David A. Wiley, Mississippi's retained expert geologist.

[4] Appendix 2 includes excerpts from the transcript of the deposition of Jamie Crawford, one of Mississippi's designees pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Mr. Crawford is the Assistant Director of the MDEQ's Office of Land and Water Resources.

[5] Appendix 3 includes excerpts from the transcript of the deposition of Jim Hoffman, one of Mississippi's designees pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Mr. Hoffman is the Geologist Administrator of the MDEQ's Office of Land and Water Resources.

[6] Appendix 4 includes excerpts from the transcript of the deposition of Charles Branch, Director of the MDEQ's Office of Land and Water Resources from 1979 until 2002.

also id., p. 3 (describing the ground water at issue as "confined within Mississippi's boundaries by the geology of [the Aquifer]"). This novel position is directly refuted by Mississippi's numerous admissions throughout this litigation that the Aquifer is a single interstate water resource, underlying parts of several states, including Tennessee. *See, e.g.*, Amended Complaint, ¶ 14, Doc. 112 (Oct. 5, 2006) (asserting that the Aquifer "is an underground reservoir that underlies portions of West Tennessee and Northwest Mississippi"); *Dist. Ct.* (Petition, p. 23a) (noting that "it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi").

Mississippi's new contention is also at odds with its own assertions concerning jurisdiction and the application of federal common law to this case, both of which rely on the fact that the Aquifer is an interstate water resource shared by Tennessee and Mississippi. *See, e.g.*, Petition, p. 21 n.9 (relying on the "interstate nature of the sand formation comprising the aquifer" as the basis for federal question jurisdiction and the "transboundary character of the aquifer" as grounds for the application of federal common law); Amended Complaint, ¶¶ 8, 46, Doc. 112 (Oct. 5, 2006) (characterizing its lawsuit as an "interstate or transboundary ground water dispute"); *Dist. Ct.* (Petition, pp. 25a-26a) (noting Mississippi's conflicting and irreconcilable positions and holding that Mississippi "cannot have it both ways").

Third, Mississippi claims that Respondents engaged in an "aggressive extraction of ground water" and thereby "largely drained the aquifer under

Memphis." Petition, pp. 4-5. The prejudicial impact of this gross misrepresentation is compounded by Mississippi's equally false insinuation that unlike surface water, ground water cannot be replenished. Petition, p. 3. Both of these statements are directly contradicted by Mississippi's own allegations in this lawsuit, which make no claim that ground water is scarce or that Mississippi's use of the Aquifer has been impaired by pumping in the Memphis area. Additionally, Mississippi's own Rule 30(b)(6) and expert witnesses directly refuted these statements when they testified that the Aquifer is constantly being replenished. In fact, Mississippi's own expert agreed that, as a result of the Aquifer's continual recharge and discharge, any change in the availability of ground water in Mississippi since pumping began more than one hundred years ago is statistically insignificant. App. 1, pp. 3b, 5b.

3. Procedural History

Mississippi filed this lawsuit on February 1, 2005. In its original complaint, Mississippi asserted various causes of action, including unjust enrichment, trespass, conversion, nuisance, and unlawful taking or inverse condemnation. *See generally* Complaint, ¶¶ 23-39, 45-52, Doc. 2 (Feb. 1, 2006). Mississippi sought relief in the form of monetary damages for alleged past and future injuries, declaratory judgment, constructive or resulting trust, and an injunction requiring Memphis to abandon its exclusive reliance on ground water as a public water source and convert to a surface water system using the Mississippi River. *See generally id.*, ¶¶ 40-44, 53-60.

Among other allegations in its original complaint, Mississippi asserted that Memphis and MLGW had "damaged and diminished the Aquifer, and [Mississippi's] rights and interests therein," by "lowering of the Aquifer groundwater table or artesian pressure," "injuring the Aquifer's ability to recharge, or replenish itself naturally," "causing fear of current and future injury and damage and uncertainty regarding the quality and availability of sufficient quantities of water supplies," and "[causing] financially devastating damage to, destruction of or detrimental impact upon residential and commercial development of Northwest Mississippi." *Id.*, ¶ 19.

On October 5, 2006, Mississippi filed an amended complaint in which it eliminated all the above-quoted allegations and withdrew its claims that pumping in the Memphis area had damaged the Aquifer and Mississippi's use of the Aquifer. *See generally* Amended Complaint, Doc. 112 (Oct. 5, 2006). Mississippi's amended complaint was based solely on Mississippi's alleged "ownership" of a specific quantity of ground water in the interstate Aquifer. *See generally id.*, ¶ 10. Mississippi ultimately abandoned all of its causes of action except for conversion, trespass, and unjust enrichment, and only sought past money damages for what it contended to be the ground water unlawfully taken by Memphis and MLGW from 1965 to 2007. *See, e.g.*, Pretrial Order, Doc. 293, p. 4 (Jan. 23, 2008); Memorandum of Authorities, Doc. 317, p. 1 (Feb. 1, 2008); App. 5, pp. 20b-21b.[7] Respondents

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[7] Appendix 5 is an excerpt from the oral argument held in the district court on February 4, 2008 (Mississippi counsel's argument).

filed two dispositive motions seeking to dismiss Mississippi's claims, one after the filing of the original complaint and another after the filing of Mississippi's amended complaint. *See* Motion to Dismiss, Doc. 21 (Mar. 10, 2005); Motion for Judgment on the Pleadings, Doc. 186 (June 12, 2007). Both motions asserted, *inter alia*, that dismissal was required because Tennessee was an indispensable party under Rule 19 of the Federal Rules of Civil Procedure, and its joinder would trigger this Court's original and exclusive jurisdiction pursuant to 28 U.S.C. § 1251(a). The district court denied both motions. *See* Order Denying Motion to Dismiss, Doc. 47 (Aug. 9, 2005); Order Denying Motion for Judgment on the Pleadings, Doc. 263 (Sept. 25, 2007).

However, on January 28, 2008, the district court entered an order *sua sponte*, giving notice that, "[a]fter carefully reading the parties' pretrial submissions and briefs," it was revisiting the matter of "whether the States of Tennessee and Arkansas are indispensable parties to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure." Order, Doc. 313 (Jan. 28, 2008). On February 4, 2008, after the matter had been briefed and argued by the parties, the district court dismissed Mississippi's lawsuit pursuant to Rule 19. *Dist. Ct.* (Petition, pp. 19a-29a). The court held that Tennessee was a necessary and indispensable party to the action and that, because the joinder of Tennessee was not possible without the court's losing subject matter jurisdiction, equity and good conscience required that this action be dismissed without prejudice. *Dist. Ct.* (Petition, p. 28a).

Mississippi appealed to the Fifth Circuit, which affirmed the district court's ruling in all respects. The

Fifth Circuit found "no abuse of discretion in the district court's determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed." *Fifth Cir.* (Petition, p. 15a). On September 2, 2009, Mississippi filed its Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit's ruling that Tennessee is a necessary and indispensable party is not in conflict with the decisions of any other circuit. Sup. Ct. R. 10(a). Further, the decisions below are entirely consistent with and, in fact, required by this Court's long-standing interstate water rights precedent. The rulings of the Fifth Circuit and the district court were based on established law regarding Rule 19 of the Federal Rules of Civil Procedure and firmly grounded in more than a century of this Court's equitable apportionment jurisprudence. Therefore, there is no important federal question that remains unsettled. Sup. Ct. R. 10(c).

Relying on this Court's precedent, the Fifth Circuit correctly upheld the district court's dismissal of Mississippi's action because Tennessee is a necessary and indispensable party under Rule 19, and Tennessee's joinder would trigger this Court's original and exclusive jurisdiction.

> The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share. Allocation of an

> interstate water source is accomplished through a compact approved by Congress or an equitable apportionment.
>
> . . . Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine.

Fifth Cir. (Petition, pp. 8a-9a) (citations omitted). The determination of rights to an interstate water resource can be adjudicated only "between states" and through an equitable apportionment action. Tennessee is unquestionably a necessary and indispensable party to any such adjudication pursuant to Rule 19 because Tennessee's sovereign rights to the use of the Aquifer are clearly and adversely implicated by Mississippi's assertion of "ownership" of the unapportioned ground water. This Court would have original and exclusive jurisdiction over the adjudication of that matter pursuant to 28 U.S.C. § 1251(a). As such, dismissal was required.

The applicable law is settled and without conflict. There are no compelling reasons to grant Mississippi's Petition.

I. The Decision Below Is Consistent With This Court's Well Settled Equitable Apportionment Decisions.

A. Under this Court's equitable apportionment decisions, Tennessee is a necessary and indispensable party.[8]

Mississippi concedes the application of "federal common law because of the transboundary character of the aquifer." Petition, p. 21 n.9. For over a century, this Court has held that "[e]quitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado*, 459 U.S. at 183. This Court's "apportionment by judicial decree of the water of an interstate stream" can take place only with the states as parties – it is a matter "between states." *Hinderlider*, 304 U.S. at 107; *see Fifth Cir.* (Petition, p. 11a) ("The Aquifer must be allocated like other interstate water resources in

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[8] The fact that Mississippi improperly lays claim to interstate waters that have not been apportioned does not mean that Mississippi has sufficient grounds to state a viable claim for equitable apportionment or that there is merit to Mississippi's contemporaneously filed Motion for Leave to File a Bill of Complaint in an Original Action (Original No. 139). The decisions of the district court and the Fifth Circuit were correct, irrespective of this Court's decision on Mississippi's Motion for Leave. *See Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1311 (N.D. Ala. 2005) (finding that the district court must dismiss any action "whenever it involves 'a controversy between two or more states,' regardless of whether the case appears to be one over which the Supreme Court will, in its discretion, exercise jurisdiction").

which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation."); *see also Arizona v. California*, 373 U.S. 546 (1963), *abrogated on other grounds by California v. U.S.*, 438 U.S. 645 (1978); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297 U.S. 517 (1936); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Kansas v. Colorado*, 206 U.S. 46 (1907).

Mississippi's lawsuit is, on its face, a dispute over rights to use an interstate water resource underlying and shared by Mississippi and Tennessee. Tennessee's rights are, by definition, implicated by Mississippi's unilateral claim of "ownership" of water in the Aquifer that has never been apportioned. The courts below correctly held that the doctrine of equitable apportionment is the only means to adjudicate such a dispute, and only this Court has jurisdiction to hear it. *See Colorado*, 459 U.S. at 183; 28 U.S.C. § 1251(a).

Mississippi's decision to sue only non-state defendants and frame its claims in tort cannot change the fact that Mississippi's allegations necessarily presume that the interstate Aquifer has already been apportioned. That presumption is undeniably wrong. And if the Aquifer is to be apportioned, Tennessee must be a party to that proceeding. *See* App. 6, p. 23b.[9] As the district court recognized:

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[9] Appendix 6 includes excerpts from Tennessee's Amicus Curiae Brief filed with the Fifth Circuit in support of Respondents.

> The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of which State. It is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto* apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee.

Dist. Ct. (Petition, pp. 23a-24a).

Mississippi has brought the wrong claims against the wrong parties in the wrong court. Consistent with this Court's equitable apportionment decisions, the courts below rejected Mississippi's attempt to avoid joining Tennessee to this action and triggering this Court's original and exclusive jurisdiction. *See Hinderlider*, 304 U.S. at 107 (finding that the apportionment of interstate waters was a controversy "of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators") (quoting *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922)); *Texas*, 462 U.S. at 567 ("There is no doubt that this Court's jurisdiction to resolve controversies between two states extends to a properly framed suit to apportion the waters of an interstate stream between States through which it

flows.") (citations omitted); *Arizona*, 373 U.S. at 564 (recognizing this Court's "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States"). This law is settled and without conflict. Certiorari is not warranted.

B. Mississippi's claim to "own" a specific quantity of ground water in the Aquifer based solely on its state boundary has been consistently rejected by this Court.

Mississippi's contention that it "owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood," Petition, p. 12, ignores the obvious interstate nature of the Aquifer and of this dispute.[10] Mississippi's position is directly contrary to this Court's repeated equitable apportionment pronouncements finding that a state's boundaries are

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[10] Mississippi's claim of ownership based solely on its political boundaries, like its erroneous contention that a hydrogeological barrier exists directly beneath the Mississippi-Tennessee state boundary, is part of Mississippi's flawed effort to change the true physical nature of the Aquifer from what it is (an interstate water resource underlying and shared by both Tennessee and Mississippi), into something it most assuredly is not (an intrastate resource lying only within Mississippi's borders). Throughout this lawsuit, Mississippi and its experts have unequivocally admitted that Aquifer is a shared interstate resource. Mississippi has affirmatively relied on the "interstate nature" of the Aquifer as the basis for its assertion of jurisdiction in the district court and the application of federal common law to its claims. Petition, p. 21 n.9; *see also* Sup. Ct. R. 15(2).

"essentially irrelevant" to the determination of its rights to use an interstate water resource:

> "The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other."
>
> . . . "Both States have real and substantial interests in the River that must be reconciled as best they may."

Hinderlider, 304 U.S. at 102-03 (quoting *Wyoming*, 259 U.S. at 466, and *New Jersey*, 283 U.S. at 342-43); *see also Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (rejecting "the notion that the mere fact that the [river] originates in Colorado automatically entitles Colorado to a share" and finding that the water's source "should be essentially irrelevant to the adjudication of these sovereigns' competing claims"); *cf. Idaho v. Oregon*, 462 U.S. 1017, 1028 n.12 (1983) (noting that, "[w]hile the origin of the fish may be a factor in the fashioning of an equitable decree, it cannot by itself establish the need for a decree").

The Fifth Circuit rejected Mississippi's position that its state border serves as the sole basis for allocating ground water in the Aquifer – the same failed position advanced by other states in previous equitable apportionment suits:

> The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.

Fifth Cir. (Petition, p. 10a) (citing *Hinderlider*, 304 U.S. at 102); *see also Hinderlider*, 304 U.S. at 102-03 (rejecting an upstream state's claim that it has "such ownership or control" to divert all the water in an interstate resource as having been "consistently denied" and "adjudged untenable").

Implicit in the decisions below is the recognition that, in the context of this lawsuit, the "[Aquifer] throughout its course in both states is but a single [resource], wherein each state has an interest which should be respected by the other." *Hinderlider*, 304 U.S. at 102. There is no conflicting authority.

C. Mississippi's attempt to create an exception to the doctrine of equitable apportionment for underground interstate water resources is illogical and contrary to this Court's decisions.

In a transparent attempt to avoid the application of equitable apportionment (and, therefore, the required joinder of Tennessee as a party), Mississippi argues that there is a legally significant distinction between water flowing interstate above the ground and water flowing interstate below the ground. In other words, Mississippi contends that equitable apportionment should not apply to ground water. Citing no authority,

Mississippi bases its contention on a legally unsupported reference to the "residence time of water within a particular geographic area." Petition, p. 18. The Fifth Circuit properly found Mississippi's argument unpersuasive:

> The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The Aquifer flows, if slowly, under several states, and is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.

Fifth Cir. (Petition, p. 9a).

In fact, this Court has already equitably apportioned interstate water systems that include hydrologically connected underground water components. *See, e.g.*, *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995); *Washington*, 297 U.S. at 524-26; *see also Fifth Cir.* (Petition, pp. 9a-10a & n.5) (citing *Texas*, 462 U.S. at 556-57 & nn.1-2, and *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980), and finding persuasive this Court's equitable apportionment decisions in which "aquifers were not treated differently from any other part of the interstate water supply subject to litigation"); DAN A. TARLOCK, LAW OF WATER RIGHTS & RESOURCES § 10:6 (2009) (noting this Court's holdings that "groundwater pumping can interfere with surface allocations made in an interstate compact" and finding it "likely" that equitable apportionment would be applied to "all water resources, including interstate aquifers"). This Court's precedents thus lend no

support to Mississippi's asserted distinction between surface water and ground water.

Further, Mississippi's position urging an extremely narrow application of equitable apportionment (*i.e.*, only to surface waters with a sufficient "residence time") cannot be reconciled with *Idaho v. Oregon*, 462 U.S. 1017 (1983). In that case, this Court expanded the application of the doctrine beyond interstate water resources to include disputes over interstate wildlife resources. This Court held that, while equitable apportionment "had its roots in water rights litigation" the "natural resource of anadromous fish is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes." *Id.* at 1024 (citing *Kansas*, 206 U.S. at 98). If disputes over anadromous fish fall with the equitable apportionment doctrine – and thus implicate the sovereign rights of bordering states – then disputes over ground water surely also fall within its scope. *See* 4 WATERS & WATER RIGHTS § 45.01, pp. 45-3 – 45-5 (Robert E. Beck ed., 1991 ed., 2004 repl. vol.) (reasoning that this Court "would likely extend the equitable apportionment doctrine to interstate groundwaters" after having already "taken the bolder step of extending the doctrine from interstate streams to anadromous fish runs").

The Fifth Circuit's conclusion that there is no meaningful distinction between surface water and ground water for purposes of applying equitable apportionment is entirely consistent with this Court's prior decisions. Mississippi's contrary position – that interstate waters flowing beneath the ground are "not sufficiently similar" to interstate waters flowing above

the ground – is illogical, unwarranted, and contrary to this Court's precedent.

II. The Decision Below Does Not Conflict With This Court's Decisions Regarding State Sovereignty.

Mississippi erroneously contends that the rulings of the Fifth Circuit and the district court conflict with principles of state sovereignty because, by virtue of the equal footing and public trust doctrines, the ground water at issue is not part of a natural resource shared with another state.[11] Petition, p. 9. This contention is

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[11] The equal footing and public trust cases cited by Mississippi are all *intra*state title suits concerning submerged land. None addresses disputes between states over rights to shared interstate water resources. *See, e.g.*, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988) (quoting *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 510 (Miss. 1986) (explaining "this in the end is a title suit")); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (title dispute over submerged land beneath Lake Coeur d'Alene, a lake located entirely within Idaho); *Montana v. United States*, 450 U.S. 544 (1981) (title dispute over a portion of the bed of the Big Horn River located entirely in Montana); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (title dispute over a portion of the Willamette River bed located entirely within Oregon); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (title dispute over submerged lands located beneath Lake Michigan on Chicago's lakefront); *Pollard v. Hagan*, 44 U.S. 212 (1845) (title dispute over land entirely within Alabama that lay beneath Mobile Bay during high tide); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842) (title dispute involving oyster beds on submerged lands under Raritan Bay located entirely within New Jersey). *Howard v. Ingersoll*, 54 U.S. 381 (1851), was a dispute involving private parties, the outcome of which required the determination of the state boundary line

indisputably incorrect – factually, scientifically, and legally.

At the core of this Court's interstate water dispute decisions is the "cardinal rule, underlying all the relations of the states to each other" – "that of equality of right." *Kansas*, 206 U.S. at 97.

> Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Id. at 97-98; *see also Connecticut*, 282 U.S. at 670 (stating that equitable apportionment disputes are to "be settled on the basis of equality of right" and that "principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand'") (quoting *Wyoming*, 259 U.S. at 465).

By claiming "ownership" of a specific portion of water in the interstate Aquifer, Mississippi has overtly "reach[ed], through the agency of natural laws, into

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between Alabama and Georgia along the Chattahoochee River. *Howard* has no application to this case whatsoever.

the territory of another state." *Kansas*, 206 U.S. at 97. Mississippi's claim, by definition, infringes on the sovereignty of Tennessee because it presumes that Mississippi's rights to the unapportioned ground water are superior to Tennessee's rights to the shared interstate resource. That is not the law. No state's self-proclaimed right to an interstate resource can trump another state's competing right, as Mississippi has tried to do in this litigation.

The decisions of the Fifth Circuit and the district court do not conflict with or abrogate state sovereignty, as Mississippi suggests. The opposite is true. Precisely because Tennessee and Mississippi are each sovereign states, on equal footing with one another, the present case is one that fits comfortably within the framework of this Court's equitable apportionment jurisprudence. This interstate water dispute necessarily implicates the sovereign interests of states on equal footing with each other, and thus Tennessee is a necessary and indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure. Pursuant to 28 U.S.C. § 1251(a), this Court would have original and exclusive jurisdiction over a properly framed action for equitable apportionment of the Aquifer. This law is settled, and there are no questions of federal law here that have not already been long since put to rest.

III. The Decision Below Does Not Conflict With Courts' Interpretations of 28 U.S.C. § 1251(a).

A. There is no conflict with *Illinois v. Milwaukee*.

The Fifth Circuit and the district court both correctly found Mississippi's reliance on *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee*"), to be unfounded. *Milwaukee* is a water pollution, not a water allocation, case in which Illinois sought to trigger this Court's jurisdiction under 28 U.S.C. § 1251(a) by forcing Wisconsin into its suit against the City of Milwaukee under the legal theory that the state was vicariously responsible for the polluting activities of its political subdivision. *Milwaukee*, 406 U.S. at 94.

In this case, the Fifth Circuit recognized a "crucial factual difference" between the claims in *Milwaukee* and those asserted by Mississippi here.[12] *Fifth Cir.*

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[12] The *Milwaukee* Court recognized a distinction between water pollution cases (such as the one before it) and cases concerning the "problem of apportioning the waters of an interstate stream" (such as this one). *Milwaukee*, 406 U.S. at 105. The *Milwaukee* Court noted that "[e]quitable apportionment of the waters of an interstate stream has often been made under the head of our original jurisdiction." *Id.* at 106 (citing *Kansas v. Colorado*, 206 U.S. 46 (1907), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Arizona v. California*, 373 U.S. 546 (1963)). The federal common law of public nuisance – which controlled the outcome in *Milwaukee* – was preempted by federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (concluding that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate

(Petition, p. 13a). In *Milwaukee*, Wisconsin's sovereign rights and interests in a particular quantity of the water in Lake Michigan were not at issue. Here, however, "Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law." *Fifth Cir.* (Petition, pp. 13a-14a). Further, Tennessee has explicitly asserted its sovereign interest in the shared use of the unapportioned Aquifer. *See* App. 6, pp. 22b-23b.

Mississippi's contention that the Fifth Circuit's decision conflicts with *Milwaukee* ignores the fundamentally different nature of the claims at issue. Mississippi misreads *Milwaukee* to mean that a state can never be a necessary and indispensable party to a lawsuit in which it was not named as a party. *See* Petition, p. 24 (contending that Tennessee's interests are not implicated simply because "Mississippi seeks damages against Memphis and MLGW only and has made no claim against Tennessee"). Mississippi's interpretation is flatly contrary to *Milwaukee* itself and at odds with purpose of Rule 19, which exists to avoid the very injustice that Mississippi attempts to perpetrate – that is, bringing a claim in the absence of all parties who have a right to be heard. In this case, the Fifth Circuit correctly held that "Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis." *Fifth Cir.* (Petition, p. 14a). *See, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953); *see also New Jersey*, 283 U.S. at 342-43 (explaining

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nuisance concepts . . . but rather has occupied the field through the establishment of [the Federal Water Pollution Control Act]").

that a river "must be rationed among those who have power over it" and that both New Jersey and New York "have real and substantial interests in the [Delaware] River that must be reconciled as best they may"); *Wyoming*, 259 U.S. at 466 ("The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other."). *Milwaukee* is not to the contrary.

B. There is no conflict with rulings from the Eighth and Eleventh Circuits involving the U.S. Army Corps of Engineers.

Mississippi erroneously relies on *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117 (11th Cir. 2005), *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242 (11th Cir. 2002), and *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied*, 541 U.S. 987 (2004) (collectively "the Corps lawsuits"), to support its position that Tennessee can be joined as a party defendant without invoking this Court's original and exclusive jurisdiction.

The Corps lawsuits all have in common a critical factor that is absent here – the presence of the U.S. Army Corps of Engineers (the "Corps"). In each case, the Corps acts as a federally authorized entity charged with controlling the flow of water to the affected states via dams and reservoirs owned and operated by the Corps pursuant to federal statute. None of the Corps lawsuits involved the application of federal common law, which Mississippi alleges should apply in this case. Rather, the central legal issue in the Corps lawsuits was the scope of the Corps' statutory

authority to operate its dams and reservoirs. *See Georgia,* 302 F.3d at 1256 n.11; *Alabama*, 424 F.3d at 1130 (adjudicating the Corps' authority and obligations vis-à-vis its operation of Buford Dam / Lake Lanier under, *inter alia*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (2003), and the Water Supply Act of 1958, 43 U.S.C. § 390b (2003)); *South Dakota*, 330 F.3d at 1025 (adjudicating the Corps' authority to manage the Missouri River pursuant to the Flood Control Act of 1944, Pub. L. No. 78-532, 58 Stat. 887 (1944)).

Because the states' claims in each of the Corps lawsuits were against the Corps, and not against each other, both the Eighth and Eleventh Circuits held that this Court's original and exclusive jurisdiction was not triggered. *See Alabama*, 424 F.3d at 1130 (rejecting Georgia's contention that this Court's had original and exclusive jurisdiction over the dispute and finding that "Alabama and Florida are not attempting to litigate their right to a certain amount of the water in the ACF Basin" and were instead "seek[ing] to ensure the Corps' compliance with federal law"); *Georgia*, 302 F.3d at 1256 n.11; *South Dakota*, 330 F.3d at 1025.

There is no conflict between the decision below and the Corps lawsuits because the Corps is not involved in the case at bar. Neither the Corps nor any other federal agency manages the Aquifer or dispenses the Aquifer's waters to its various users in different states. The interpretation of a federal statute is not at issue. The Fifth Circuit recognized that "Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law," and, therefore, correctly distinguished the Corps lawsuits as being suits by

states "against the [Corps], not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a)." *Fifth Cir.* (Petition, pp. 12a-14a).

IV. The Decision Below Does Not Raise an Important or Unsettled Question Regarding Rule 19.

The district court's dismissal of Mississippi's lawsuit pursuant to Rule 19 and the Fifth Circuit's affirming of that decision do not raise important or unsettled legal questions. Determining whether to dismiss an action for failure to join a necessary and indispensable party involves a two-step inquiry. First, under Rule 19(a)(1), the court must ascertain whether the non-party should be joined to the litigation. That requires an analysis of whether the non-party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1). If a necessary party cannot be joined without destroying the district court's subject matter jurisdiction, the district court must further assess whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

The district court found that Tennessee was a "necessary party" under Rule 19(a)(1) "because in its absence complete relief cannot be accorded among those already parties to the action." *Dist. Ct.* (Petition, p. 25a):

> [T]o afford the State of Mississippi the relief sought and to hold that the Defendants have

> misappropriated Mississippi's water from the Memphis Sands aquifer, the court must *necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee*, and so on, thereby *effectively apportioning the aquifer*.

Dist. Ct. (Petition, p. 25a) (emphasis added).

The district court found that the factors of Rule 19(b) had been met because a judgment against Memphis and MLGW "would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action." *Dist. Ct.* (Petition, p. 27a) Further, the court found no "means by which . . . the prejudice to Tennessee can be lessened or avoided" and noted that any relief afforded "to the Plaintiff of necessity requires apportionment of the subject aquifer, thereby causing great prejudice to Tennessee." *Dist. Ct.* (Petition, p. 27a). Finally, the district court held that "a judgment rendered in Tennessee's absence will not be adequate" and that Mississippi would "certainly have an adequate remedy if this action is dismissed for nonjoinder." *Dist. Ct.* (Petition, p. 27a).

The Fifth Circuit noted that "[d]etermining whether an entity is an indispensable party is a highly practical, fact-based endeavor," and, therefore, the district court's determination is reviewable only for abuse of discretion. *Fifth Cir.* (Petition, p. 5a). The Fifth Circuit found that "[c]learly a judgment rendered in Tennessee's absence would be enormously prejudicial to Tennessee's sovereign interest in its water rights." *Fifth Cir.* (Petition, p. 15a). Finding no

abuse of discretion, the Fifth Circuit held that the dismissal of Mississippi's lawsuit pursuant to Rule 19 was entirely consistent with this Court's interstate water rights cases. *Fifth Cir.* (Petition, p. 15a) ("The specter of a determination of Tennessee's water rights without its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party.") (citing *Hinderlider*, 304 U.S. at 106-07, and *New Jersey*, 283 U.S. at 346). The decision below thus reflects a straightforward analysis of Rule 19, which follows logically and inevitably from this Court's interstate water rights decisions. There is no authority to the contrary.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel, THE STATE OF MISSISSIPPI, Acting for itself and Parens Patriae for and on behalf of the People of the State of Mississippi,

Plaintiff,

Vs. Case No. CIVIL ACTION 2:05CV32D-B (And Related Cases)

THE CITY OF MEMPHIS, TENNESSEE and MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

THE DEPOSITION OF DAVID A. WILEY

VOLUME I

November 15th, 2007

BRIAN F. DOMINSKI, RPR, RMR
ALPHA REPORTING CORP.

COURT REPORTERS
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* * *

[p.28] * * *

Q. And there is no question but the water was flowing before there was any pumping?

A. Groundwater moves.

[p.29] * * *

Q. (BY MR. DAVID BEARMAN) You just said that groundwater moves.

A. Yes.

Q. Is that correct?

A. Yes.

Q. And groundwater was moving before there was any pumping?

A. Yes.

* * *

[p.30] * * *

Q. There was water flowing through Mississippi before there was any pumping in the Memphis Sands Aquifer, right?

A. Yes.

Q. And some of that water flowed through Mississippi and out of Mississippi before there was any pumping, right?

A. Yes.

* * *

A. * * * there is a groundwater flow system that has a groundwater budget in a given area. For this I'll say DeSoto County, that geographical area. This groundwater system has a groundwater budget where under natural conditions water flows into the given area. There is an amount of water that is -- a volume, a volume that is constant in the groundwater system, and there is an amount that flows out of that given area.

[p.31] * * *

A. The volume -- there is a volume that is always there. It has always got some coming in and some going out, but there is a constant volume that is always there * * *

* * *

[p.46] * * *

Q. You said groundwater moves?

A. Groundwater moves.

Q. All right. I asked you that groundwater was moving through DeSoto County before there was any pumping. Do you agree with that?

A. Yes.

Q. Okay. And some of that groundwater then was moving out of DeSoto County. Isn't that right?

A. Yes.

Q. Okay. And it was -- that means that it was leaving DeSoto County at some point, correct?

A. There is a -- there was some leaving, yes.

[p.47] * * *

Q. When it left DeSoto County, where did it go?

A. Groundwater under predevelopment conditions --

Q. Predevelopment conditions.

A. -- generally flows from east to west. There is a slight north component to that. * * *

* * *

[p.89] * * *

Q. All right. That was water that was naturally going from Mississippi into Shelby County?

A. That was water under predevelopment going from DeSoto County into Shelby County.

* * *

[p.90] * * *

Q. Well, as we sit here today, do you recall any change in storage?

A. Very little. As I sit here today, it was a small number.

Q. When you say "small number," is it --

A. Less than one. I mean, it was point something or another. .02. I'd have to look at the budget files.

Q. Is that insignificant in the scheme of things that we're talking about here?

A. Yes. When you are talking about thirty-five million, point zero something is not going to affect it very much.

* * *

[p.99] * * *

A. I meant to say -- I forgot we were talking predevelopment.

Q. So it just flowed because of gravity?

A. Yes.

Q. Okay. Either way, it is moving from the DeSoto County water budget to the Shelby County water budget?

A. Yes.

* * *

[p.123] * * *

A. * * * predevelopment in the Memphis Sands flows -- an amount flows from somewhere in DeSoto [p.124] County to Shelby.

* * *

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, ATTORNEY GENERAL, EX REL., THE STATE OF MISSISSIPPI, ACTING FOR ITSELF AND PARENS PATRIAE FOR AND ON BEHALF OF THE PEOPLE OF THE STATE OF MISSISSIPPI,

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV32-D-B
CONSOLIDATED

THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,

DEFENDANTS

DESOTO COUNTY, MISSISSIPPI

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV085-D-B

THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,

DEFENDANTS

NESBIT WATER ASSOCIATION, INC.; MISSISSIPPI UTILITY COMPANY, INC.; AND BILL J. ROBERSON, ON BEHALF OF THEMSELVES AND ALL OTHER ENTITIES AND PERSONS SIMILARLY SITUATED
PLAINTIFFS

VS. CIVIL ACTION NO. 2:05CV108-D-B

THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION
DEFENDANTS

VIDEOTAPE DEPOSITION OF MDEQ 30(b)(6)
JAMIE CRAWFORD

Taken at Mississippi Department of Environmental Quality, 2380 Highway 80 West, Jackson, Mississippi, on Monday, July 30, 2007, beginning at 9:20 a.m.

* * *

[p.11] * * *

Q. And, Mr. Crawford, where do you presently work?

A. I work for the Department of Environmental Quality in the Office of Land and Water Resources.

Q. And is that what we often call MDEQ?

A. Yes.

Q. And that stands for Mississippi Department of Environmental Quality?

A. Correct.

* * *

[p.12] * * *

Q. What is your current position?

A. I'm the Assistant Director of the office.

Q. And how long have you had that position?

A. For three years.

Q. What are your general responsibilities and duties?

A. I am in charge of all permitting. I am in charge of many of the -- well, in keeping up with the water levels that are taken, the water use program, the source water assessment protection program. And those would probably be my main duties.

* * *

[p.34] Q. MDEQ is responsible for implementing the statutes and regulations of the State of Mississippi that have to do with groundwater, is that correct?

A. Correct.

Q. Are you familiar with the term "water use warning area"?

A. Yes.

Q. I'm going to hand you a document, if you could take a look at this for me.

A. (Witness complying.)

Q. Do you recognize that document? Do you recognize what I've just handed you?

A. Yes. It's part of our water statute.

Q. All right. And this is actually Mississippi statute Section 51-3-11; is that correct?

A. Correct.

Q. And have you seen this before?

A. Yes.

Q. Now, according to this statute, it says "the commission." Who is the commission?

A. The commission is a board that's appointed by the governor that acts as really our regulatory body.

[p.35] Q. Is that MDEQ?

A. Yes.

Q. It says: "The commission shall issue a water use warning or declare and delineate a water use caution

area if one of the following conditions exists. Number 1, the mining of an aquifer is occurring, or, 2, existing water resources, including surface water, groundwater, or both, are inadequate to meet present or reasonably foreseeable needs."

Did I read that correctly?

A. Yes.

Q. I'll hand you a second document. And do you recognize this as Mississippi law 51-3-3?

A. Yes.

Q. And if you'll turn to page 14, under definition M, it says: "Mining of an aquifer"; do you see that?

A. Yes.

Q. It says: "Mining of an aquifer means the withdrawal of groundwater from hydrologically connected" -- sorry -- "hydrologically connected water wearing formations in a manner in excess of the standards established by the commission."

[p.36] Did I read that correctly?

A. Yes.

Q. And the commission is MDEQ.

A. Yes.

Q. Now, MDEQ has never issued a water use warning; is that correct?

A. That's correct.

Q. And it has never declared or delineated a water use caution area; is that correct?

A. That's correct.

* * *

[p.40] * * *

Q. And you are here as the 30(b)(6) representative of MDEQ and the Office of Land and Water Resources to discuss permits.

A. Yes.

* * *

[p.89] * * *

Q. And, in fact, the water in the Sparta aquifer and the Memphis Sands aquifer and in the Lower Wilcox, Fort Pillow aquifers are flowing, correct?

A. Correct.

Q. They're -- this is not like a bathtub where the water's just sitting there.

A. Correct.

Q. It's moving more like a slow river, if you will.

A. Yes.

* * *

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, ATTORNEY GENERAL, EX REL., THE STATE OF MISSISSIPPI, ACTING FOR ITSELF AND PARENS PATRIAE FOR AND ON BEHALF OF THE PEOPLE OF THE STATE OF MISSISSIPPI,

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV32-D-B
CONSOLIDATED

THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,

DEFENDANTS

DESOTO COUNTY, MISSISSIPPI

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV085-D-B

THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION

DEFENDANTS

NESBIT WATER ASSOCIATION, INC.; MISSISSIPPI UTILITY COMPANY, INC.; AND BILL J. ROBERSON, ON BEHALF OF THEMSELVES AND ALL OTHER ENTITIES AND PERSONS SIMILARLY SITUATED)
PLAINTIFFS)
)
VS. CIVIL ACTION NO. 2:05cv108-D-B)
)
THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION)
DEFENDANTS)

VIDEOTAPE DEPOSITION OF MDEQ 30(B)(6)
JIM HOFFMAN

Taken at Mississippi Department of Environmental Quality, 2380 Highway 80 West, Jackson, Mississippi, on Monday, July 30, 2007, beginning at 3:00 p.m.

* * *

[p.7] * * *

Q. Okay. Can you tell me what your current position is?

A. I'm a geologist administrator with the Office of Land and Water Resources, which is [p.8] within the Department of Environmental Quality.

Q. What are your job duties?

A. I supervise several geologists and an engineer. We do investigations of groundwater resources in the state.

* * *

Q. And is your primary area groundwater?

A. Yes, it is.

* * *

[p.24] * * *

Q. All right. Now, the water in the Memphis Sands aquifer, the groundwater, is flowing, correct?

A. Yes, sir.

Q. This is not a bathtub we're talking about where the water is just stuck in one place.

A. No, sir.

Q. And the water comes in at the recharge area on, for example, the eastern side of DeSoto County, correct?

[p.25] A. Yes, sir.

Q. And then moves through DeSoto County.

A. Yes, sir.

Q. Now, before there was any pumping in the Memphis Sands or Sparta aquifer, that water was moving through DeSoto County, correct?

A. Yes, sir.

Q. The water wasn't going to stay in DeSoto County.

A. Ultimately, no, sir.

* * *

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel., THE STATE OF MISSISSIPPI
PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV32-D-B
CONSOLIDATED FOR DISCOVERY

THE CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER DIVISION,
DEFENDANTS

DESOTO COUNTY, MISSISSIPPI
PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV085-D-B

THE CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER DIVISION
DEFENDANTS

NESBIT WATER ASSOCIATION, INC., et al.
PLAINTIFFS

VS. CIVIL ACTION NO. 2:05cv108-D-B)
)
THE CITY OF MEMPHIS, TENNESSEE,)
and MEMPHIS LIGHT, GAS & WATER)
DIVISION)
DEFENDANTS)
)

THE VIDEOTAPED DEPOSITION OF
CHARLES THOMAS BRANCH

Taken on behalf of the Defendants on October 1, 2007, at the Barrett Law Office, 404 Court Square North, Lexington, Mississippi 39095, beginning at approximately 9:36 a.m.

Reported By: Marilyn C. Rea, CSR 1059, RPR 036208

* * *

[p.13] * * *

Q So you were head of the Office of Land and Water Resources from 79 until 2002?

A That is correct, sir.

* * *

[p.18] * * *

Q * * * The water in the Memphis Sands and Sparta aquifer is moving through the sand particles, correct?

A Correct.

Q It's not like a bathtub and static, right?

A Correct.

* * *

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General,
ex rel., THE STATE OF MISSISSIPPI,
Acting for Itself and Parens
Patriae for and on Behalf of the
People of the State of Mississippi
PLAINTIFF

VS. NO. 2:05CV32

THE CITY OF MEMPHIS, TENNESSEE, AND
MEMPHIS LIGHT, GAS & WATER DIVISION
DEFENDANTS

ORAL ARGUMENT REGARDING JURISDICTION
BEFORE HONORABLE GLEN H. DAVIDSON

Federal Building, Oxford, Mississippi
February 4, 2008

* * *

[p.8] * * *

[Mr. Cameron:] * * * At this juncture, Mississippi has streamlined this case.

As you know from our submission on Friday, Your Honor, we have elected not to pursue the injunctive relief. We've also, as evidenced by our pretrial order and findings of fact and conclusions of law, eliminated some other claims, and this is simply an action for damages by Mississippi against these defendants for the trespass and conversion and unjust enrichment resulting from taking of water from DeSoto County only, no other geographical area, and certainly not from Tennessee or Arkansas or -- and it does not involve any conduct that would implicate the core interest of those states.

* * *

APPENDIX 6

No. 08-60152

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JIM HOOD, Attorney General, ex rel., THE STATE OF MISSISSIPPI, Acting for Itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi, Plaintiff-Appellant	)
v.	)
THE CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER DIVISION, Defendants-Appellees	)

On Appeal from the United States District Court
for the Northern District of Mississippi,
Delta Division (2:05CV32-D-B)

***AMICUS CURIAE* BRIEF OF THE STATE OF TENNESSEE IN SUPPORT OF THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT GAS AND WATER DIVISION AND REQUESTING AFFIRMANCE OF THE DISTRICT COURT**

* * *

The State of Tennessee submits this brief as *amicus curiae* in support of appellees, the City of Memphis and Memphis Light, Gas and Water, and in accordance with Fed. R. App. P. 29 and 5th Cir. R. 29. * * * An equitable apportionment would implicate the sovereign interest of Tennessee in the aquifer ground water within its borders. This interest arises from Tennessee's power as sovereign to regulate this natural resource for the benefit of its citizens. * * *

Because of its sovereign interest in the aquifer ground water, Tennessee would be a necessary and indispensable party to an equitable apportionment action. * * *

* * *

As noted, the Memphis Sands aquifer is an interstate water body underlying Tennessee and Mississippi, as well as other states in the region. Tennessee certainly has an interest as sovereign in the ground water within its borders. * * *

* * *

An action to equitably apportion the ground water in the Memphis Sands aquifer would implicate the sovereign interests of Tennessee. * * *

* * *

148

No. 09-289

Supreme Court, U.S.
FILED
DEC 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE STATE OF MISSISSIPPI,
Petitioner,

v.

THE CITY OF MEMPHIS, TENNESSEE, AND
MEMPHIS LIGHT, GAS & WATER DIVISION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

THE STATE OF MISSISSIPPI'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities iii

Introduction 1

Reply to Respondents' Statement of Case 2

A. Reply to Respondents' "Factual Background" 3

B. Reply to Respondents' Assertion That Mississippi's Description of Its Ground Water is False 4

Reply to Respondents' Brief in Opposition 8

Reasons for Granting Certiorari 8

I. Reply to Respondents' Brief Part I: Equitable Apportionment Does Not Apply to Mississippi's Ground Water Diversion Claims Against Respondents. 8

II. Reply to Respondents' Brief Part II: The Fifth Circuit Ignored this Court's State Sovereignty Decisions in Its Misapplication of Section 1251(a). 11

III. Reply to Respondents' Brief Part III: The Fifth Circuit's Decision Conflicts with Other Circuits. 12

IV. Reply to Respondents' Brief Part IV: The Fifth Circuit's Erroneous Rule 19 Analysis Stems from Its Conflict with

Decisions of This Court and the Eleventh and Eighth Circuits. 12

Conclusion 13

TABLE OF AUTHORITIES

Cases

Hinderlider v. La Plata River & Cherry Ditch Co.,
304 U.S. 92 (1938) 8, 9

Kansas v. Colorado,
206 U.S. 46 (1907) 1, 8

Nebraska v. Wyoming,
515 U.S. 1 (1995) 10

Nebraska v. Wyoming,
534 U.S. 40 (2001) 10

Phillips Petroleum v. Mississippi,
484 U.S. 469 (1988) 8

Washington v. Oregon,
297 U.S. 517 (1936) 4, 10, 11

Statutes

28 U.S.C. §1251(a) 3, 11, 12, 13
28 U.S.C. §1367 6

Other Authorities

Joseph L. Sax, *et al.*, *Legal Control of Water Resources* (4th ed. 2006) 5

INTRODUCTION

The lower courts erred in accepting Respondents' equitable apportionment arguments. The equitable apportionment cases, beginning with *Kansas v. Colorado*, 206 U.S. 46 (1907) address the issue of equality of right between states holding conflicting Constitutionally grounded sovereignty claims to surface water naturally flowing through their territorial boundaries. The fact that the disputed surface water flowed through the territorial lands of each of the sovereign states under natural conditions gave rise to legitimate claims of multiple states to sovereignty over the same flowing water. To resolve these legitimate conflicting rights held by separate states, the Court invoked the cardinal rule of equality of right among the states to apportion a limited supply of surface water naturally flowing through multiple states. This is what the Court did in *Kansas v. Colorado,* and it has not extended this jurisdiction beyond disputes arising from Constitutionally based claims of state sovereignty over water naturally traveling through the states on an interstate path.

Mississippi's case does not invoke the rule of equality of right between separate states asserting a Constitutionally grounded territorial sovereignty claim to the same "interstate water." Mississippi claims damages only for the ground water stored in the aquifer which, under natural conditions, would never flow into Tennessee's territory. This ground water is, within any relevant time, "intrastate water" falling under Mississippi's exclusive territorial sovereignty. Respondents' argument, unlike those of Kansas and Colorado, is not grounded in the Constitution; rather, it rests solely in Respondents' power to mechanically

divert Mississippi's intrastate ground water away from its natural course within Mississippi and draw it into Tennessee using one of the world's largest artesian well pumping operations to extract approximately 200,000,000 gallons of ground water out of the aquifer every day.

Nothing in the equitable apportionment cases supports their application to the intrastate ground water naturally residing in Mississippi which is the subject of Mississippi's case, and Tennessee is not a necessary party. Tennessee does not have, and has never asserted, any sovereign territorial claim to Mississippi's ground water naturally residing within Mississippi, this is not a dispute between states, and the cardinal rule of equality of right is not at issue; accordingly, the opinions of the lower courts should be reversed and the case remanded for trial against Respondents.

REPLY TO RESPONDENTS' STATEMENT OF CASE

In their paragraphs titled "Factual Background" and "Rule 15(2) Misstatements of Fact in Mississippi's Petition" Respondents carefully avoid relevant facts in favor of a semantic clouding of conclusions and arguments to mask Respondents' total lack of any legitimate legal or equitable interest in the ground water they are draining from beneath Mississippi's sovereign territory. This brief section of the reply will address relevant facts.

A. Reply to Respondents' "Factual Background"

Significantly, Respondents never assert that the Mississippi intrastate ground water they appropriate through pumping would ever naturally flow into the territorial boundaries of Tennessee; instead, they only assert that the aquifer contains "ground water flowing" and that the aquifer [geological formation] crosses the Mississippi-Tennessee state border. This does not support any legitimate claim of right to ground water naturally residing in Mississippi.

The fact that Tennessee authorizes Respondents to pump ground water *naturally residing* within Tennessee's territorial borders is equally irrelevant. Tennessee's sovereign powers over ground waters naturally residing within its boundaries are not challenged, nor has Tennessee challenged Mississippi's correlative sovereignty over its ground water in this proceeding; accordingly, the Court's Section 1251(a) jurisdiction is not implicated by Tennessee's authorization to pump ground water naturally residing within Tennessee's boundaries. When Respondents took it upon themselves to reach beyond those boundaries into Mississippi with their pumping, Respondents, not Tennessee, violated Mississippi's sovereign rights. This dispute should be resolved in an available alternative forum, the United States District Court.

The Court has never "apportioned an aquifer," or the water in one, between states. Mississippi is not asserting that the Court could not apportion ground water which does, in fact, naturally reside within two states during some relevant time. Nevertheless, to

date, the Court's discussion of ground water issues within equitable apportionment cases has been limited to pumping from a ground water source with a direct hydrological connection to interstate surface water being apportioned between sovereign states. Even in this context, the Court has acknowledged that state law controls the appropriation and use of ground water. *Washington v. Oregon,* 297 U.S. 517, 525 (1936) (pointing out that ground water pumped by farmers for use on their lands did not materially impact surface water being apportioned, but that a different question would arise if the water extracted "had been sold or otherwise employed for use on distant lands," which "is unlawful according to the rule in many [state] courts.")

B. Reply to Respondents' Assertion That Mississippi's Description of Its Ground Water is False

These facts support Mississippi's sovereign territorial claim to the ground water being mechanically appropriated by Respondents:

- The ground water at issue resides in a confined (not unconfined) aquifer and *is* "naturally entrapped" and "*essentially* static." It moves imperceptibly about an inch a day beneath Mississippi. *See* Supplemental Appendix annexed hereto ("Supp. App."), 69a-71a. This movement is about 30 feet per year in a predominantly east to west direction. Petition for Writ of Certiorari ("Pet."), 3-4 & 18-19. Tennessee's ground water does not, and cannot, move naturally into Mississippi; and Mississippi's water would never have moved into Tennessee absent the massive commercial

pumping operation of Memphis and MLGW. As between the states, the aquifer ground water is defined and confined in a finite quantity which has resided[1] within, and was apportioned to, each state as part of its sovereign territory since it was admitted to the Union. It is Respondents' dogmatic assertion that the ground water at issue in this case is "dynamic" and "flowing" which is misleading.

- The fact that the ground water at issue -- the water stored in the isolated sand formation underlying Desoto County, Mississippi -- is contained within larger interconnected aquifer systems known as the Mississippi Embayment has been acknowledged by Respondents' experts as irrelevant to Respondents' pumping-induced diversions of Mississippi's ground water.[2] The

---

[1] Ground water movement under the surface is exceedingly slow. "Surface water may move tens of kilometers per day, but water below the land surface may move at *meters* per *year* or even less. The time required to replace the water in the ground (to replenish or recharge aquifers) is often measured in decades or centuries." Joseph L. Sax, *et al.*, *Legal Control of Water Resources*, 397 (4th ed. 2006). "Moreover, some aquifers are 'recharged,' or replenished very slowly or not at all. Pumping water from these aquifers may amount to mining a non-renewable resource, much as petroleum or gold is mined." *Id.* at 395.

[2] This suit involves a segregated sub-area of an interstate aquifer isolated to and confined (or residing) in north Mississippi. Defendants' own experts acknowledge that they could demonstrate no impact of pumping in other states within the Mississippi Embayment on the water levels in the Memphis/Desoto County, Mississippi area. Supp. App., 80a-81a, 89a-92a, 94a-98a.

interstate geology of the aquifer which allows Respondents to mechanically appropriate Mississippi's sovereign ground water is only relevant to the existence of federal question jurisdiction.[3] The geology is interstate, but the ground water at issue naturally resides only in Mississippi.

- In painting their picture of the aquifer as a naturally flowing stream running through Tennessee, Respondents simply ignore the scientifically verified regional cone of depression created by Respondents' well field pumping by which it diverts Mississippi ground water from its natural path and pulls it into Tennessee from Mississippi for sale and use by Memphis. *See* Appendix to Mississippi's Motion for Leave to File Bill of Complaint in Original Action ("Mot. App."), 58a-61a, 63a-104a, 108a-117a, 198a-204a, 212a-214a; Supp. App., 71a-78a, 82a-83a, 87a-88a, 99a-102a. Contrary to the "gross misrepresentation" and "false insinuation" claim by Respondents, the confined aquifer's water level in Mississippi is being drawn down by Respondents' pumping faster than the ground water can be replenished or "recharged." Mot. App. 59a-61a, 74a. Respondents' pumping has forever altered the aquifer ground water budget, diverting water

---

[3] The interstate or transboundary nature of the dispute provides the basis for federal question jurisdiction as the Fifth Circuit recognized, thus calling for application of federal common law the rule of which may be provided by reference to state law. Pet., 21 n. 9. The trial court also has supplemental or pendant jurisdiction over Mississippi's state law claims under 28 U.S.C. §1367.

from centuries old storage in Mississippi into storage beneath Memphis. *Id.* Their pumping operations have disturbed the aquifer's steady-state equilibrium and changed the flow path and rate of the aquifer, redirecting the water so that it flows at an accelerated unnatural rate and northward path directly into MLGW's well fields. *Id.*, 57a-61a, 70a-74a, 91a, 106a-114a; Supp. App., 68a-82a.

The fact that water resources, albeit diminishing, still remain present within Mississippi's territorial borders is not relevant to Respondents' past taking of over 400 billion gallons of ground water which is now permanently lost to Mississippi and its citizens. Mot. App., 58a-59a, 71a. Memphis' unlawful diversions continue at a rate of 24 million gallons per day, or 8.76 billion gallons per year. *Id.*, 58a, 71a. There is no return flow; rather, the diverted water has been permanently converted into storage under Memphis, *id.*, 60a-61a, forever depriving Mississippi of a sovereign natural resource critical to life, agriculture and economic development. This wrongful appropriation of ground water will continue unabated without compensation to Mississippi indefinitely for the life of the aquifer unless Mississippi's claims are adjudicated.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

REASONS FOR GRANTING CERTIORARI

Kansas v. Colorado, 206 U.S. 46 (1907) fully affirmed the territorial sovereignty of each state under the Constitution over all "lands *within its borders*, including the beds of streams and other waters," and that within this sovereignty each state retained the authority to establish the controlling property law. The Court expressly observed the force of *Martin v. Waddell's Lessee* and its progeny establishing state sovereignty in this area. *Id.* at 93-95. In *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988) the Court once again recognized this state sovereignty. Nevertheless, the opinions of the trial court and of the court of appeals clearly accepted Respondents' reading of *Hinderlider v. La Plata River & Cherry Ditch Co.*, 304 U.S. 92 (1938) as requiring the allocation or apportionment of *any* ground water residing in the aquifer (geological formation) without regard to the natural flow or availability of such water. Mississippi's Petition affords the Court an opportunity to clarify the Constitutional reach of the equitable apportionment cases and to resolve conflicts regarding its original jurisdiction among the federal circuit courts of appeal.

I. Reply to Respondents' Brief Part I: Equitable Apportionment Does Not Apply to Mississippi's Ground Water Diversion Claims Against Respondents.

Mississippi's case is not an action between competing sovereigns, and *Hinderlider* and its progeny

do not apply.[4] *See* Pet., 9-15. Mississippi's complaint does not involve interstate ground water shared by Mississippi and Tennessee under the Constitution of the United States; rather it seeks damages for ground water apportioned to Mississippi at statehood by virtue of its sovereign authority retained over its lands and the waters naturally residing within its boundaries.

The ground water at issue is being mechanically diverted and converted by non-state Respondents, Memphis and MLGW, not Tennessee. Accordingly, there is no "actual existing controversy" between states regarding apportionment or allocation. *Id.*, 26-27. Under *Waddell's Lessee* and related cases, state law governs use and allocation of the ground water owned separately by Mississippi and Tennessee. There is no basis for intervention by this Court or any federal court to allocate ground water already allocated at statehood. *Id.*, 9-12.

Respondents' argument that Mississippi does not "own" a specific quantity of ground water disregards 160 years of this Court's precedent. *Id.* Under this precedent, every state in the United States exercises some degree of sovereign dominion, control and legal ownership and regulatory management of the surface and ground water within its territory. App., 54a-62a. *Hinderlider* and the other cases cited by Respondents in support of their claim to Mississippi ground water are all distinguishable in that these cases uniformly

---

[4] Contrary to Respondents' assertion, the acknowledgment that federal common law may apply does not automatically convert this case into a dispute between sovereigns.

arise in disputes between sovereign states over surface water freely and naturally flowing across the contesting states' borders and territory.

The Mississippi ground water being converted by Respondents does not fall within these confines. It is intrastate ground water which naturally creeps within Mississippi, in a predominantly east to west direction, at an imperceptible rate, deep below the surface in dense sand, rock and sediment formations confined between clay layers. Respondents claim is not one resting in Tennessee's sovereignty, it is one resting in their power to artificially appropriate that which would never naturally reside in Tennessee. Only Mississippi's water is at stake. There is no basis for Respondents' argument that this is a "shared" resource.

Mississippi does not seek creation of an "exception" to the doctrine of equitable apportionment. Once again Respondents go much further with the Court's opinions than the Court has ever gone. The ground water issues addressed in *Nebraska v. Wyoming*, 515 U.S. 1 (1995) were limited to ground water pumping from wells in Wyoming (upstream state) which were hydrologically connected and supplied North Platte River water which the Court had already apportioned. *See, Nebraska v. Wyoming*, 534 U.S. 40 (2001). If anything, the *Nebraska* case supports Mississippi's position that Respondents may not take water by pumping which belongs to Mississippi as sovereign. *Washington v. Oregon*, 297 U.S. 517 (1936) is no more helpful to Respondents. In rejecting a claim that farmers using well water were decreasing river flow, the Court affirmed that ground water is regulated by state law and its appropriation and use is much more

restricted. *Id.* at 524-526. Neither of these cases apportion an aquifer or address the water in one independent of apportioned interstate surface water.

II. Reply to Respondents' Brief Part II: The Fifth Circuit Ignored this Court's State Sovereignty Decisions in Its Misapplication of Section 1251(a).

There is no dispute concerning the separate sovereign ownership of territorial waters as between Mississippi and Tennessee. The states of Tennessee and Mississippi respect each other's sovereign ownership and control of their underground waters residing within their state. In contrast. as between Mississippi and Respondents, there is no "equality of right" to water which belongs to and is subject exclusively to the control of Mississippi for use by its citizens.

Despite the clear limitations of Mississippi's claims, Respondents argue that the claims necessarily implicate the sovereign interests of states on equal footing with each other and that, despite the lack of any claim by Mississippi against Tennessee, Tennessee is nevertheless a Rule 19 party. Respondents' summarily conclude that Tennessee's unasserted claim of sovereignty automatically makes Mississippi's case a dispute between states within this Court's original and exclusive jurisdiction. As previously addressed, jurisdiction is not established absent claims between competing states or in the presence of an alternative forum. Pet., 26-28. Respondents fail to meet these strict criteria under Section 1251(a) and Tennessee is not a necessary party.

III. Reply to Respondents' Brief Part III: The Fifth Circuit's Decision Conflicts with Other Circuits.

Respondents' argument concerning application of Section 1251(a) may be distilled to its assertion that "[t]he Corp. lawsuits all have in common a critical factor that is absent here -- the presence of the U.S. Army Corps of Engineers ('The Corps')." Respondents summarily argue that, because the state's claims in each of the Corps lawsuits were against the Corps, and not against each other, the Eighth and Eleventh Circuits held that the Court's original and exclusive jurisdiction was not triggered.

It in not clear how this argument aids Respondents. Mississippi's action is only against non-state entities, Memphis and MLGW. Mississippi has no claims against Tennessee or any other state. Section1251(a) precludes exercise of the Court's original and exclusive jurisdiction unless (a) there is an actual controversy between two states in which one state seeks redress of direct injuries caused by another and (b) there exists no alternative forum. Here, the element of "actual controversy between states" is missing and there is an alternative forum, the United States District Court for the Northern District of Mississippi. The Court's original and exclusive jurisdiction is simply not invoked.

IV. Reply to Respondents' Brief Part IV: The Fifth Circuit's Erroneous Rule 19 Analysis Stems from Its Conflict with Decisions of

This Court and the Eleventh and Eighth Circuits.

The District Court's Rule 19 analysis, as affirmed by the Fifth Circuit, was based upon the unfounded *assumption* that Tennessee's interests are somehow vaguely affected by Mississippi's claims against Respondents. Tennessee's ground waters and its sovereign control over them are not an issue. That the District Court decision (affirmed by the Fifth Circuit) does not raise an important or unsettled question regarding Rule 19 is of no moment. This Petition is not simply aimed at the Fifth Circuit's blanket affirmance of the District Court's misapprehension of the requirements of Rule 19. Mississippi's Petition should be granted because the Fifth Circuit's decision conflicts with the decisions of this Court regarding the state's sovereign authority over natural resources within its boundaries, Pet., 9-12, and with Mississippi's decisional and statutory law applicable to ownership and preservation of its natural resources. *Id.,* 15-20. Further, the Fifth Circuit's judgment conflicts with the decisions of this Court and the Eleventh and Eighth Circuits regarding Section 1251(a) jurisdiction, *id.*, 20-28, and presents questions of national importance regarding sovereign rights of Mississippi and all other states of the Union to ownership and control of water resources. *Id.*, 28-31; App., 54a-62a.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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THE STATE OF MISSISSIPPI'S PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel,
THE STATE OF MISSISSIPPI, Acting
for itself and Parens Patriae for
and on behalf of the People of the
State of Mississippi,

Plaintiff,

Vs. Case No. CIVIL ACTION 2:05CV32D-B
(And Related Cases)

THE CITY OF MEMPHIS, TENNESSEE and
MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

THE DEPOSITION OF JOHN VAN BRAHANA
November 5th, 2007

BRIAN F. DOMINSKI, RPR, RMR
ALPHA REPORTING CORP.
COURT REPORTERS
LOBBY LEVEL, 100 NORTH MAIN BUILDING
Memphis, Tennessee 38103
(901) 523-9874

[p. 8]

DIRECT EXAMINATION BY MR. CAMERON:

Q. Would you please state your name for the record.

A. John Van Brahana.

* * *

[p. 10]

Q. By whom were you retained?

* * *

A. Baker, Donelson, Bearman

Q. What was the scope of or your charge in connection with your duties as a consulting expert? In other words, what services were you asked to provide by the Baker-Donelson Lawfirm?

A. Assessment of technical work that I had done previously, groundwater geology, in the area . . . I had worked in the Memphis area from approximately 1977 on with the US Geological Survey, and in that collaboration I had been involved with groundwater modeling and practical problems that related to movement of water underground in the shallow aquifers, the Memphis Sand and the deeper aquifer.

* * *

[pp. 11-12]

Q. Specifically relating to the sand aquifer?

A. Yes, yes.

Q. Memphis Sand Aquifer?

A. Yes, yes.

* * *

[p. 17]

Q. Are you currently still with the USGS?

A. I'm classified as a research scientist emeritus.

* * *

[pp. 26-27]

Q. [W]ere these studies . . . related more to water quality or contamination issues?

A. They were also interested in the volume of water, quantity . . . .

Q. [W]hat you mean by the "volume of water, quantity," . . . . [?]

A. The assessment of groundwater is based on . . . balancing water budgets. And a water budget is composed of water that infiltrates the surface, that moves vertically downward. Some moves horizontally through the permeable layers of the rock.

Then there is also a component of water volume that is stored within the openings or the voids in the sands of the Memphis Aquifer.

* * *

[pp. 30-31]

Q. What is meant by the term steady-state equilibrium?

A. Steady-state equilibrium is a modeling term. It means that the rates of change are not varying . . . "steady state" means . . . an equilibrium in a simple terms.

Q. [C]an you describe what an equilibrium in the context of . . . a mass of water like the Memphis Sand Aquifer . . . mean[s] . . . ?

A. Equilibrium means the amount of water that is coming in is the same as the amount that is going out and that the gradients . . . the water table . . . are at a state that is, even though they may be still declining, it is a level, steady state or linear relationship . . . .

Q. [C]ould you explain what you mean in relation to the Memphis Sand Aquifer as a groundwater budget?

* * *

[p. 32]

A. Okay. The components of the groundwater flow budget include -- I'll draw an analogy to our checkbooks, how much money do we earn. That's the

amount coming in. That is recharge, that is water that is moving in any kind of amount in versus the amount that goes out. . . . And you need to also consider how much is in storage, how much money you had in your banking account before you started. And you can balance that.

* * *

[pp. 33-37]

Q. So if I had to visualize this aquifer . . . containing groundwater, what would it look like in steady-state equilibrium?

A. The aquifer itself is in a trough. Beneath the trough there are deep rocks that have been fractured and dropped down. They were filled in with these sands and clays. . . It is a thick sequence . . . .

* * *

A. [In] the Memphis Sand Aquifer . . . water flows naturally from points of input or recharge locations to discharge locations, natural discharge locations . . . Most of the water . . . at least initially prior any pumping or any modification under a steady state condition, the water came out in areas underneath in Arkansas . . . .

Q. When you use the word "flow" . . . , would you describe what kind of flow are you talking about?

* * *

A. The proper term in groundwater terminology, "laminar" flow means the water is moving -- it defines "laminar" as one end member. "Turbulent flow" is another. A river flows with turbulent flow because of high velocities. Most groundwater velocities typically are much slower than surface water.

* * *

Q. Are you familiar with the velocity of the flow in the Memphis Sand Aquifer?

A. Yes.

* * *

Q. What is . . . the speed at which the Memphis Sand Aquifer actually flows . . . ?

* * *

Q. I've heard numbers like an inch a day. Would that be a fair statement of the velocity at which generally the water moves in the Memphis Sand Aquifer?

* * *

A. An inch per day with 365, that's three feet a year.

* * *

A. . . . I think it is on the order of three feet per year, some of the slower velocities, that could be.

Q. [I]f I were to try to visualize or see the movement of this water in the sands . . . -- would it be perceptible.

* * *

A. [N]o, it would not be perceptible to human capabilities.

* * *

[pp. 42-43]

Q The "cone of depression" . . . Define that, please, sir.

* * *

A. It . . . is created by constructing a well . . . open to the sand layers. Speaking specifically for the Memphis Aquifer, you pull water out of storage in the well . . . So you have lowered the water level in the well . . . . The cone of depression . . . will go down to a sharp cone shape, a three-dimensional shape. It gets steeper near the well . . . . That cone of depression is what pulls the water. It drives the water into the well.

* * *

[p. 44]

Q. Is that just a function of gravity and pressure?

A. Gravity and pressure drive the flow of groundwater, that's correct.

Q. So any water that surrounds the cone will inexorably flow into the cone?

A. Yes.

Q. Or be drawn into the cone?

A. Yes, it will be drawn . . . .

* * *

[p. 45]

Q. Are you familiar with the fact that there is a cone of depression that . . . centers in Memphis and extends outward into Shelby County and DeSoto County, Mississippi?

A. The drawdown from Memphis, yes, yes.

* * *

[p. 46]

Q. [I]f the cone of depression extends into DeSoto County, Mississippi, from pumpage within the Memphis area, water from Mississippi is flowing into the Memphis area?

A. That's correct.

* * *

[pp. 90-91]

Q. I'm going to read the last paragraph of that page in the record and I'll ask you to explain what this means[:] "From 1886 to 1975 pumpage at Memphis had drawn down the original potentiometric surface by as much as 150 feet in the major pumping center and reversed the original gradient, which was to the

west . . . Flow that moved through the area toward natural discharge points to the south and west before 1886 is now diverted and captured by pumpage at Memphis." Do you see that?

A. I do.

Q. What does it mean that the pumpage from Memphis for the period from 1886 to 1975 had drawn down the original potentiometric surface?

A. The original water table, the non-pumping water table, had sloped toward the west . . . when you start pumping, you superimpose the cone of depression, and you capture water, and that's how water comes in.

* * *

[pp. 95-97]

Q. When you say the drawdown in these well fields had reversed the original gradient . . . what does that mean?

A. That means that the water surface, when it was originally going . . . from the east, the flow was across toward the west, and when you pull the water level down, it is -- there was a gentle slope toward the west. The pulling that water level down by pumping has caused the gradient to be reversed . . . .

* * *

Q. What does the word "diverted" mean?

* * *

A. That means the flow has been changed.

* * *

Q. Then when you state that it is being captured by pumpage at Memphis, what does that mean?

A. That means if the water level is lower . . . the flow follows that elevation at that surface, that potentiometric surface, and you have changed the direction into the pumping centers into the well, into the well fields.

Q. So that it [is] now flowing into the Memphis well fields?

A. Yes.

* * *

[p. 122]

Q. What does that document depict?

A. It depicts the water level of the Memphis Sand . . . .

* * *

Q. Does that document reflect the cone of depression that we've alluded to earlier?

A. It does.

Q. Does the document show the cone of depression extending across the Tennessee-Mississippi border into DeSoto County, Mississippi?

A. It does.

* * *

[p. 130]

Q. [Referring to an exhibit] . . . it states "Should Memphis ever need a source of water to supplement as present supply, the Mississippi River passes by its doorstep carrying tremendous volumes of water." Do you see that?

A. I do.

Q. Were you ever called upon to study the use of Mississippi River water as a source of supply for the City of Memphis, Memphis Light, Gas & Water Division?

A. No.

* * *

[p. 132]

Q. Is it fair to say that MLG&W is the largest pumper of groundwater in the Memphis area?

A. Yes.

Q. The arrows depicted on that document, what do they show?

A. They show flow directions.

Q. Are there arrows on the document marked as Exhibit 15 to your deposition depicting flow of water from the State of Mississippi into the Memphis metropolitan area? Do you see arrows that would --

A. I do.

Q. So there is water flowing, according to that chart, from Mississippi into Memphis?

A. That's correct.

* * *

[pp. 135-137]

Q. There is a reference to flow direction on that document in relation to the Memphis Sand Aquifer, is there not?

A. There is.

Q. What does it say?

A. "Into pumping center."

Q. What does that mean?

A. That means that the water . . . flows into the main pumping well fields of the area, the Memphis metropolitan area.

Q. Which would include MLG&W's well fields, correct?

A. It would include MLG&W's well fields . . . .

* * *

Q. Now . . . as a result of pumping in your study did you determine that as a result of pumping that the flow path had changed from its natural course?

A. Yes.

Q. What was the nature of that change?

A. . . . The flow was across from the southeast toward the northwest, and with the inclusion of pumping, there was a creation of a cone of depression around the major centers of pumping . . . .

* * *

Q. When you prepared your work product for your three-dimensional model, in the course of that work did you determine that water was flowing from the south into the cone of depression northward into the Memphis pumping centers?

A. Yes.

* * *

[pp. 162]

Q. (BY MR. CAMERON) I'll ask you to identify that document for the record, please, sir.

A. This is the potentiometric map of the Memphis Sand in the Memphis area, Tennessee, August, 1978, by David Graham. It is a Water Resources Investigation Open-file Report 79-80.

* * *

[pp. 165]

Q. Does this map, potentiometric surface map, reflect the cone of depression resulting from pumpage in the Memphis area?

A. It does.

* * *

[p. 166]

Q. Does the potentiometric map show the Tennessee-Mississippi boundary?

A. This does.

Q. Does it show the cone of depression expending extending across the Mississippi-boundary?

A. The 200-foot contour line closes across the Mississippi-Tennessee boundary, yes.

* * *

[pp. 172-173]

Q. Who funded the modeling report which is marked as Exhibit 10 to your deposition?

A. The City of Memphis, Memphis Light, Gas & Water Division, the US Geological Survey Water Resources Division, and Tennessee Department of Environment & Conservation . . . .

* * *

Q. [W]hat is achieved by groundwater modeling?

A. Groundwater modeling is a tool to take physical laws, in this particular case the physics of water flow, and looking at boundary conditions, looking at factors that influence those, try to develop a water budget, try to evaluate what water levels will be with respect to pumping a particular set of wells or stresses, putting stresses on a system and evaluating what those responses are . . . If a model is done correctly, we should be able to reproduce how much water was pumped.

* * *

[pp. 174-175]

Q. Did you follow standard groundwater model development protocols in the preparation of . . . Exhibit 10?

A. I did.

* * *

Q. They would be described in your report?

A. They are described in the report . . . We measure water levels because the water levels are very important. Those are the effect of human impact in an area. So water-level measurements is important. We do a compilation of the pumping, of the human stresses that are induced in an area . . . All of those

influence the overall cone of depression or the impact of utilizing a natural system.

* * *

[p. 177]

Q. [W]hat is meant by "conceptual model setup"?

A. A conceptual model is . . . a mind picture . . . . [A] conceptual model will be involved with what are the major controlling influences.

* * *

[p. 178]

Q. Or . . . a major stress, like pumpage?

A. Pumpage . . . the pumping centers are part of your conceptual model.

* * *

[pp. 179-180]

Q. This is a simulation . . . of the Memphis Aquifer layers in the Memphis Aquifer. Is this what you are referring to in the grid?

A. Very closely spaced, that's correct.

Q. But the actual study area is the smaller area labeled "Memphis Area"?

A. Yes . . . that's the Memphis metropolitan area around Shelby County . . . Desoto County. That is the area that was the main focus of the people who -- MLG&W was paying for the project . . . . So I . . . focused the results on what was called the Memphis area.

* * *

[p. 202]

Q. Would . . . it be possible to take the contours that are depicted on your Figure Number 7 and do sort of a rough flow net analysis to show the direction of flow and to quantify the volumes?

A. Yes.

* * *

[p. 203]

Q. What direction is it flowing from DeSoto County into Shelby County?

A. From DeSoto County it is flowing . . . toward the northwest.

Q. Into the MLG&W pumping centers?

A. Into the pumping center of metropolitan Memphis.

* * *

[p. 205]

Q. What about with regard to Figure 26 on Page 43 . . . of Exhibit 10?

A. Yes, Figure 26 Exhibit 10.

Q. It flows more northerly?

A. Yeah.

Q. That one that you have just drawn is flowing almost northward?

A. It is almost flowing north, yes.

* * *

[p. 206]

Q. Out of Mississippi into the Memphis area?

A. It is flowing, yes, from Mississippi into the Memphis area.

* * *

Q. And it demonstrates, does it not, based on the flow lines you've just drawn, that water, groundwater, in fact was flowing from Mississippi into the Memphis well fields?

A. There is water . . . moving into the Memphis metropolitan area.

Q. Is that a result of pumpage?

A. Yes.

* * *

[pp. 212-213]

Q. (BY MR. CAMERON) To your knowledge, Dr. Brahana, has MLG&W ever taken any steps whatsoever to reduce the cone of depression so that it would not extend into the State of Mississippi?

A. I don't know the answer to that. I do not know of any.

* * *

Q. (BY MR. CAMERON) To your knowledge, were the deleterious effects you referred to earlier in relation to the aquifer, did those include quantity issues that may arise as between the State of Mississippi and the City of Memphis?

* * *

MR. DAVID BEARMAN: Based on his knowledge from when he was working with the USGS, is that your question? That's fine.

* * *

[p. 214]

Q. Can you identify any specific action taken by MLG&W to mitigate the cone of depression?

* * *

A. I cannot name specific cases . . . So no.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel, THE STATE OF MISSISSIPPI, Acting for itself and Parens Patriae for and on behalf of the People of the State of Mississippi,

Plaintiff,

Vs. Case No. CIVIL ACTION 2:05CV32D-B (And Related Cases)

THE CITY OF MEMPHIS, TENNESSEE and MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

THE DEPOSITION OF DAVID LANGSETH
November 19th, 2007

BRIAN F. DOMINSKI, RPR, RMR
ALPHA REPORTING CORP.
COURT REPORTERS
Memphis, Tennessee 38103
(901) 523-9874

[p. 5]

DIRECT EXAMINATION BY MR. CAMERON:

Q. Would you please state your name for the record.

* * *

A. David Langseth.

* * *

[p. 6]

Q. (BY MR. CAMERON) What is your profession, Mr. Langseth?

A. I'm a consulting engineer.

* * *

[p. 7]

Q. You've been retained as a testifying expert witness by the defendants, the City of Memphis and Memphis Light, Gas & Water Division, correct?

A. That's correct.

* * *

[p. 17]

Q. What were you asked to do in relation to this litigation?

A. The overall scope . . . was to evaluate the characteristics of the aquifer in question here and the impact of pumping . . . .

* * *

[pp. 70-71]

Q. Do you deny that there has been water that has moved as a result of the cone of depression underlying Memphis from and caused by MLG&W pumping . . . do you deny there has been water that has crossed the boundary from Mississippi into the Memphis area?

* * *

A. . . . I am not denying that pumping in the Memphis area, specifically by MLG&W, has changed the rate at which water is crossing the state boundary line . . . .

Q. [D]o you deny that water is crossing the state border from Mississippi into Memphis as a result of pumping?

A. No, I do not deny that some of the water crossing the border is due to the impacts of pumping.

* * *

[pp. 72-73]

Q. But in that opinion you do not, do you, sir, deny that there has been cross-boundary flow from Mississippi into Memphis?

A. . . . no, I do not deny that pumping by MLG&W has influenced the amount of water crossing the border.

* * *

[pp. 78-79]

Q. You . . . were asked to evaluate the availability of groundwater in the State of Mississippi, right?

A. That's correct.

Q. What specifically were you asked to do in that context?

* * *

A. Well . . . it really means whether or not the pumping by MLG&W has influenced the availability of groundwater to people who want to pump it out of the ground in the State of Mississippi.

Q. These two areas, to evaluate the impact of pumping by MLG&W . . on the aquifer dynamics and availability of groundwater in the State of Mississippi, was that the primary initial task that you identified earlier as being the scope of . . . your role in this litigation?

A. That is the primary area . . . .

* * *

[p. 81]

Q. [W]hen you are talking about "aquifer dynamics," what aquifer are you talking about?

A. The overall review includes the entire Mississippi Embayment Aquifer System, but certainly the focus of this work was then on the Memphis Sands Aquifer . . . .

* * *

Q. Yes, that you consider to be the focused area.

A. Well, the focus area is certainly up in Northern Mississippi, Western Tennessee . . . .

* * *

[pp. 87-89]

Q. Does pumpage in south Mississippi affect the cone of depression that underlies Memphis and DeSoto County?

A. When you ask me is pumping in South Mississippi associated with the cone of depression in some other location, the answer is no. . . .

* * *

Q. So pumping in the south part of Mississippi or in Northern Louisiana does not affect the cone of depression in the Memphis area, correct?

A. . . . pumping by any wells outside of that set of wells you just defined does not affect the cone of depression for the wells that you defined as being part of the wells you are evaluating the cone of depression for.

* * *

[pp. 90-92]

Q. You talked about the fact that you evaluated pumping and the existence of cones of depression in various parts of the Mississippi Embayment, right?

A. That's correct.

Q. And you evaluated pumping in Tennessee, right?

A. That's correct.

Q. And in Arkansas?

A. That's correct.

Q. And in Mississippi?

A. That's correct.

Q. What about Illinois?

A. I don't recall if the model domain goes up to Illinois and whether or not we have pumping in Illinois or not. It may have.

Q. What about Kentucky, how about that?

A. To the best of my recollection, there was some pumping in Kentucky.

Q. Louisiana?

A. I don't think our model domain extended down into Louisiana. That's for the numerical model. I certainly looked in my broader evaluation at pumping in Louisiana.

Q. What about Missouri?

A. To the best of my recollection, there was some pumping in the model domain in Missouri.

Q. Is there any impact or overlap between the cones of depression you evaluated in Kentucky and the cone of depression in the Memphis area?

A. I didn't evaluate that specifically . . . .

Q. Is there any relationship or overlap between the cone of depression or cones of depression you evaluated in Arkansas and the cone of depression in the Memphis area?

A. I didn't do an evaluation that would allow me to say specifically whether there is an overlap between those two.

* * *

[p. 93]

Q. Is it possible to evaluate a specific sub-area of the Mississippi Embayment?

A. Yes, it is . . . .

* * *

[p. 164]

Q. Does pumping in Southern Arkansas or Northern Louisiana affect the cone in the Memphis/DeSoto area? . . . Does it affect the water levels in the Memphis/DeSoto area?

A. I haven't done an evaluation to know if the impacts of that pumping extend all the way to the Memphis area.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel, THE STATE OF MISSISSIPPI, Acting for itself and Parens Patriae for and on behalf of the People of the State of Mississippi,

Plaintiff,

Vs. Case No. CIVIL ACTION 2:05CV32D-B
(And Related Cases)

THE CITY OF MEMPHIS, TENNESSEE and MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

THE DEPOSITION OF JOHN B. ROBERTSON
November 27th, 2007

BRIAN F. DOMINSKI, RPR, RMR
ALPHA REPORTING CORP.
COURT REPORTERS
Memphis, Tennessee 38103
(901) 523-9874

[p. 7]

DIRECT EXAMINATION BY MR. CAMERON:

Q. Good morning . . . You are John B. Robertson, correct?

A. That's correct.

* * *

Q. What is your profession?

A. I am a hydrogeologist and environmental scientist.

* * *

[p. 9]

Q. [Y]ou have been retained as an . . . expert witness on behalf of the defendants in this cause, correct?

A. That's correct.

* * *

[pp. 31-32]

Q. Are you generally familiar with the claims of the State of Mississippi?

A. General in general, yes.

Q. Are you aware that the State of Mississippi claims that Memphis through pumping by MLGW has caused

water to be -- groundwater to be diverted from the State of Mississippi into the Memphis area?

A. Yes. I'm aware that's the claim.

Q. What geographical area would be your understanding that would be encompassed -- in other words, what geographical area do you believe to be the focus of the claims of the State of Mississippi?

A. Northern Mississippi and the Memphis area in general of Tennessee . . . .

Q. But Western Tennessee, Northwest Mississippi?

A. That's the focus of the Mississippi claim as I understand it.

* * *

[p. 33]

Q. [D]oes pumpage in Northern Louisiana affect the water levels in the Memphis area?

A. It can.

Q. Does it according to the study that you've done?

A. We didn't do an assessment of that, of pumpage in Louisiana.

* * *

[p. 34]

Q. So does pumpage in Kentucky affect the water levels in Memphis?

A. It would have some effect.

Q. Did you quantify the effect of the pumpage in Kentucky on water levels in the Memphis area?

A. We did not specifically quantify that . . . .

Q. Can you define . . . right now what the effect of pumpage in Kentucky is on the water levels in the Memphis area?

A. I cannot . . . .

* * *

[pp. 36-38]

Q. . . . you can't tell me, can you, quantitatively what the effect of pumpage in Missouri is or has been on the Memphis are?

A. No, I cannot.

Q. With regard to pumpage in Alabama, does pumpage in Alabama have any effect on water levels in the Memphis area?

A. It probably has some effect.

Q. But sitting here today, you can't tell me what that effect is quantitatively, can you?

A. No.

Q. Does pumpage in Illinois have any effect on the water levels in the Memphis area? . . . [Y]ou can't tell me what the effect is sitting here today, can you sir?

A. No.

Q. With regard to pumpage in South Mississippi . . . .

* * *

Q. Can you tell me today quantitatively what the effect would be of pumpage in South Mississippi on the water levels in Memphis?

A. No, I can't.

* * *

[p. 39]

Q. Is there pumpage of groundwater in East Tennessee?

A. There probably is but not from this aquifer system.

Q. Is there any pumpage in Central or East Tennessee that impacts the water levels in the Memphis area?

* * *

[pp. 40-41]

A. No . . . I wouldn't expect it to have an effect.

Q. Now, you mentioned Eastern Arkansas. Does the pumpage in Eastern Arkansas have any effect on the water levels in the Memphis area?

A. Yes.

Q. Okay. Have you quantified that effect?

A. I have not.

* * *

[p. 49]

Q. What is the order of magnitude of drawdown impact that reaches the Memphis area from northern Louisiana or Arkansas?

A. I haven't made an assessment of that.

* * *

[p. 50]

Q. So can you tell me what the impact is of pumpage in Northern Louisiana or Eastern Arkansas on the Memphis area?

A. I cannot specifically because that wasn't separated out.

* * *

[pp. 50-51]

Q. [D]o you deny that there is a cone of depression underlying Memphis and extending into the State of Mississippi?

A. No.

* * *

Q. (BY MR. CAMERON) Is there not a cone of depression underlying Memphis that extends into the State of Mississippi?

A. I would say under my review that there is a cone of depression that extends into the northern part of Mississippi.

Q. And isn't it true that that cone of depression has been created and expanded in large part as a result of the pumpage of MLG&W?

A. Well, MLG&W is a major contributor to the drawdown that causes that cone of depression.

Q. Isn't it a fact that MLG&W is the largest pumper in the Memphis area of groundwater from this aquifer system?

A. That's correct.

* * *

[pp. 58-59]

Q. In your work in this case did you do any analysis of any changes in flow direction from Mississippi into the Memphis area as a result of the cone of depression we're discussing?

A. . . . we did a significant amount of modeling of the cone of depression and the effects of all the pumping in the area on flow directions.

Q. Did that analysis demonstrate and confirm that water, groundwater, originating from beneath Mississippi is moving into the Memphis area as a result of MLG&W pumpage?

A. It did indicate that there was MLG&W pumpage that caused an increase in flow into the Memphis area from Northern Mississippi.

* * *

[p. 103]

Q. There is a cone of depression that has resulted in large part from MLG&W pumping that extends from Memphis into Mississippi, correct?

A. Into Northern Mississippi.

Q. That's right. You've agreed to that, right?

A. Yes.

* * *

[pp. 106-108]

Q. (BY MR. CAMERON) Does MLG&W pumpage cause water in the aquifer that is drawn from beneath Mississippi to move into the Memphis area?

A. . . . the answer is yes, the pumpage causes a cone of depression that allows water to move north.

* * *

Q. What does that depict? [Reference to a diagram from Mr. Robertson's expert report]

A. It is a schematic diagram illustrating the concept of a cone depression and movement of water towards a pumping well.

Q. Does the groundwater in the cone of depression get pulled towards a well, the pumping well?

A. Yes.

Q. In a cone of depression, does the water get pulled towards the steepest part of the cone?

A. It gets pulled towards the center of the cone. The center of the cone is generally the steepest part.

Q. Does the groundwater speed up as it moves towards the steepest part of the cone?

A. Yes.

* * *

Q. As to the regional cone of depression, is the steepest part of that cone within Shelby County?

A. Yes.

* * *

[p. 110]

Q. [B]ecause of the cone of depression is the water pulled into the groundwater system beneath Shelby County that would have normally been beneath DeSoto County?

A. Well, yes, it would have been beneath . . . DeSoto County . . . .

Q. But for the MLG&W pumpage, right?

* * *

[p. 111]

A. The direction that it moved was changed because of the pumpage.

Q. So MLG&W pumpage does affect the pathway by which water departs Mississippi, correct?

* * *

A. It does affect the pathway of some of the water, yes.

* * *

[pp. 152-154]

Q. To your knowledge, has MLG&W considered any alternative water supply sources other than the Memphis Sand Aquifer?

A. I don't know.

* * *

Q. Are you aware of whether or not MLG&W has considered any alternative supply facilities other than the existing system?

A. I'm not aware.

Q. Are you aware of whether or not MLG&W has made any cost analyses regarding alternative supply facilities or systems?

A. I don't know one way or the other.

Q. Have you asked for any information regarding alternative supply systems or facilities . . . ?

A. No, I have not. This opinion is based primarily on past practices.

Q. Past practices?

A. Past and current practices.

Q. Past and current practices of MLG&W?

A. Yes.

Q. Is it your testimony today that those past and current practices have not involved any consideration of alternative supply, water supply sources or facilities?

A. I don't know . . . I was looking at how they were managing their current and past resource that was their water supply, which is the Memphis Sand Aquifer.

Q. And so are you saying that the current and past water supply did not involve to your knowledge any consideration by MLG&W of alternative sources or facilities?

A. I don't know whether they did or not . . . .

Q. So you don't know whether MLG&W ever considered the use of surface water such as the Mississippi River for water supply?

A. I don't know.

Q. And you don't know whether MLG&W ever considered relocation of some of its well fields?

A. I don't know.

* * *

[pp. 159-160]

Q. Has MLG&W ever exercised a conscientious effort to take steps to eliminate or mitigate the cone of depression underlying Memphis and extending into Mississippi?

* * *

A. I don't know of any efforts that MLG&W has done to reduce the cone of depression . . . .

* * *

[p. 161]

Q. (BY MR. CAMERON) So has MLG&W made any conscientious effort based on your review and your professional judgment to take steps to change the configuration of the cone of depression so it no longer extends into the State of Mississippi?

A. Not that I know of.